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PANZER V. DOYLE: THE WISCONSIN SUPREME COURT FIRES A NEAR FATAL SHOT AT THE “NEW BUFFALO”

INTRODUCTION

Gambling is the latest fashionable vice.¹ Poker tournaments occupy precious primetime television slots, internet gambling has exploded, and Las Vegas has seen a resurgence of fame that eclipses its days of the Rat Pack.² Amidst this gambling craze, many of the nation's Native American tribes have come to rely upon gambling as a continuing means of subsistence. For these tribes, gambling has become what some commentators have called the “new buffalo.”³ Like the buffalo of old, this new buffalo is not impervious to extinction. This time, however, the metaphorical rifle lies in the hands of politicians and judges.

In *Panzer v. Doyle*,⁴ the Wisconsin Supreme Court fired a near fatal shot at this new buffalo when it held that the governor, as the representative of the State, exceeded his constitutional authority when he agreed to Indian gaming compact provisions that expanded the scope of permitted gaming⁵ and caused the gaming compacts to last indefinitely.⁶ That decision, however, rests upon a fractured legal founda-

1. See, e.g., Brooke Williams, *Shoppers Going All in for Casino Presents; Poker Kits, Mini Slots a Major Holiday Draw*, SAN DIEGO UNION-TRIB., Dec. 23, 2004, at A1 (noting that the increasing popularity of casino-style gambling has led many shoppers to purchase related items for presents during the holiday season).

2. See, e.g., Matthew Garrahan, *Internet Betting Move Forecast to Tempt Bookmakers Back Onshore*, FIN. TIMES (London), Oct. 20, 2004, at 3 (noting that in September, 2004, almost sixteen percent of all Britons who used the Internet visited an online gambling site); Alessandra Stanley, *Poker Itself Is the Winner, Along With the Grifters*, N.Y. TIMES, Jan. 13, 2005, at E1 (noting that “[g]ambling, and especially poker, has invaded almost every form of television”); Ben White, *Consolidation on the Strip Faces Antitrust Scrutiny*, WASH. POST, July 16, 2004, at E1 (noting that “[w]ith televised poker tournaments, network dramas and reality shows, Sin City has once again captured a central spot in the public imagination”).

3. See, e.g., Michael Grant, Comment, *Seminole Tribe v. Florida—Extinction of the “New Buffalo?”*, 22 AM. INDIAN L. REV. 171 (noting that “[m]any Native Americans refer to Indian gaming as the ‘New Buffalo’”).

4. 680 N.W.2d 666 (Wis. 2004).

5. This Note uses the term “gaming” to refer to gambling operations conducted by Indian tribes. Contrarily, this Note uses the term “gambling” when referring to gambling in general.

6. See *infra* notes 88–90 and accompanying text. The legal framework for permissible Indian gaming rests in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2000). Pursuant to that

tion that undermines the entire majority decision.⁷ Moreover, the court's decision creates uncertainty with respect to future compacts because it provides no guidelines for the proper scope of gaming compacts.⁸ Lastly, the decision places the future of Wisconsin Indian gaming in a precarious situation due to a sister case that has simultaneously worked its way through the Wisconsin court system.⁹

This Note will explore the court's opinion in *Panzer*. Specifically, Part II briefly discusses the history of Indian gaming in general.¹⁰ Thereafter, the discussion turns to the history of Indian gaming in Wisconsin, paying particular attention to the various compacts executed throughout the years.¹¹ Part III sets out the case in detail, including the relevant facts, the majority's holding, and the dissenting opinion.¹² With that groundwork in place, Part IV analyzes the legal soundness of the majority opinion.¹³ Part V starts by explaining the post-*Panzer* sequence of events, and then goes on to explore the potential ramifications that *Panzer* will have regarding future compacts and Indian gaming in Wisconsin.¹⁴ Finally, Part VI concludes that the majority decision misinterpreted the federal statute regulating Indian gaming and furthermore failed to provide any guidelines for future compact negotiations.¹⁵

II. BACKGROUND

The following section provides a brief history of Indian gaming on a national level, including the Supreme Court's initial recognition of the "right" to Indian gaming and Congress's response to the Court.¹⁶ With that in mind, this section also examines the history of gambling and Indian gaming in Wisconsin, with particular emphasis on the various gaming compacts between the tribes and the state.¹⁷

law, states can enter into compacts with Native American tribes which permit the tribes to conduct gaming operations within the state. See generally *id.*

7. See *infra* notes 183–219 and accompanying text.

8. See *infra* notes 313–327 and accompanying text.

9. See *infra* notes 290–312 and accompanying text.

10. See *infra* notes 18–50 and accompanying text.

11. See *infra* notes 51–106 and accompanying text.

12. See *infra* notes 107–179 and accompanying text.

13. See *infra* notes 180–282 and accompanying text.

14. See *infra* notes 283–327 and accompanying text.

15. See *infra* notes 328–338 and accompanying text.

16. See *infra* notes 18–50 and accompanying text.

17. See *infra* notes 51–106 and accompanying text.

A. *The History of Indian Gaming on a National Level*

Indian gaming operations began in the United States primarily as a means for indigent Native American tribes to make money. Predictably, the growth of such operations caught the attention of state lawmakers and, eventually, the United States Supreme Court and Congress. Nevertheless, Indian gaming has continued to experience exponential growth.

1. *Indian Gaming Facilities Crop up Across the Nation*

Beginning in the late sixties, and continuing through the present, the federal government has generally pursued a policy of tribal self-sufficiency while simultaneously cutting federal subsidies to tribes.¹⁸ During that same time, however, rampant unemployment on reservations has left a large percentage of Native Americans living at or below the poverty level.¹⁹ In the face of those devastating conditions, some tribes saw the answer in bingo and related gaming operations.²⁰

Early Indian gaming generally took the form of high stakes bingo.²¹ These early gaming operations were highly unregulated. Furthermore, they existed in a state of confusion and controversy due to conflicting judicial opinions.²² Much of this confusion stemmed from the fact that Native American tribes exist as quasi-sovereign domestic nations.²³ At the same time, Public Law 280, which Congress passed in 1953, provides some states with criminal jurisdiction over tribal lands.²⁴ Accordingly, the conflicting legal doctrines of tribal sover-

18. See Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 387-92 (1997) (discussing the federal government's policies of assimilation, relocation, and self-determination as they relate to Native Americans).

19. *Id.* at 393.

20. See William E. Schmidt, *Bingo Boom Brings Tribes Profit and Conflict*, N.Y. TIMES, Mar. 29, 1983, at A1 (estimating that forty tribes nationwide began high stakes bingo in the eighteen months prior to March 1983 in order to redress tribal economic concerns and noting that many more tribes are considering similar operations).

21. See generally *id.*

22. See *infra* notes 23-25 and accompanying text.

23. The legal framework for tribal sovereignty is rooted in a series of early United States Supreme Court cases. See Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 268-69 (2003-2004); see also Rand & Light, *supra* note 18, at 387-88. Three of these cases, *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832), establish the general principle that Native American tribes are sovereign, domestic nations subject to Congress's plenary power. See Edward P. Sullivan, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107, 1115 (1994) (indicating that "the scope of federal legislative power over Native American concerns has been interpreted as being 'plenary'").

24. 18 U.S.C. § 1162(a) (2000) states in pertinent part:

eighty and Public Law 280 caused different courts to reach varying conclusions over the validity of these early forms of Indian gaming, with the central issue being whether states could enforce their criminal laws relating to gambling against tribal reservations.²⁵ Due to these conflicting opinions, the United States Supreme Court intervened to help bring national uniformity to the issue.

2. *The Supreme Court Recognizes the Tribal "Right" to Gaming*

In 1987, the Supreme Court decided a landmark case, *California v. Cabazon Band of Mission Indians*.²⁶ That case arose when the Cabazon Band of Mission Indians (Cabazon Band) began to conduct high stakes bingo on its reservation.²⁷ The Cabazon Band also opened a card room for draw poker and other card games.²⁸ Though these operations were approved by the Secretary of the Interior of the federal government, California sought to enforce a state criminal law which placed extensive regulations on bingo games, including a \$250

Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

...

Wisconsin . . . All Indian country within the State.

Id.

28 U.S.C. § 1360(a) (2000) states in pertinent part:

Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

...

Wisconsin . . . All Indian country within the State.

Id.

Public Law 280 was conceived and enacted during a period when many tribes were experiencing rampant lawlessness on their reservations. See Sullivan, *supra* note 23, at 1115-16 (explaining that "Congress approved Public Law 280 with the primary goal of providing criminal jurisdiction to states over Native American lands where lawlessness was prevailing at the time"). By passing Public Law 280, Congress explicitly granted six states, including Wisconsin, jurisdiction over criminal activity and civil causes of action on tribal reservations. See 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). Accordingly, criminal prohibitions on gambling in these states could ostensibly be enforced upon tribal lands.

25. See *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981).

26. 480 U.S. 202 (1987).

27. *Id.* at 204-05.

28. *Id.* at 205.

prize cap per game.²⁹ In deciding whether California could enforce those laws against the reservation, the Court recognized that while Native American “tribes retain ‘attributes of sovereignty’ . . . [that] ‘sovereignty is dependent on, and subordinate to . . . the Federal Government.’”³⁰ The Court then found that states, through their authority under Public Law 280, can enforce state gambling laws on reservations if the intent of the state law is to prohibit the specific conduct at issue.³¹ Specifically, the Court stated:

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within [Public Law] 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [Public Law] 280 does not authorize its enforcement on an Indian reservation.³²

In other words, “[t]he shorthand test is whether the conduct at issue violates the State’s public policy.”³³

When the Court turned to the California statutes in question, it concluded that California public policy is to generally permit gambling despite the extensive regulations.³⁴ In so holding, the Court reasoned as follows:

California does not prohibit all forms of gambling. California itself operates a state lottery . . . and daily encourages its citizens to participate in this state-run gambling. California also permits pari-mutuel horse-race betting. . . . Although certain enumerated gambling games are prohibited under [California state law], games not enumerated, including the card games played in the Cabazon card club are permissible.³⁵

Furthermore, the Court noted that “bingo is legally sponsored by many different organizations and is widely played in California.”³⁶ Given these facts, the Court held that “California regulates rather than prohibits gambling in general and bingo in particular,” and thus the state had no jurisdiction to enforce its criminal laws relating to bingo against the reservation.³⁷

29. *Id.*

30. *Id.* at 207 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)) (internal quotation marks omitted).

31. *Id.* at 209.

32. *Cabazon*, 480 U.S. at 209.

33. *Id.*

34. *See id.* at 210.

35. *Id.* (emphasis added) (internal citations omitted).

36. *Id.* at 211.

37. *Id.*

3. Congressional Response: The Indian Gaming Regulatory Act

Cabazon was a victory for tribes nationwide; however, Congress was already in action.³⁸ In fact, almost immediately after the case was decided, Congress introduced a bill which would later become, in slightly amended form, the Indian Gaming Regulatory Act (IGRA).³⁹ One stated purpose of IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."⁴⁰ Most commentators, however, agree that IGRA was intended to balance the interest of the tribes in maintaining gaming as a means of promoting self-sufficiency, and the interest of the states in regulating gaming.⁴¹ In order to help effectuate that purpose, IGRA divided Indian gaming into three separate types: Class I, Class II, and Class III.⁴² Of these three categories, Class III gaming, which generally encompasses casino-style gambling, is the most lucrative.⁴³

After separating Indian gaming into different categories, IGRA sets forth a comprehensive scheme for the regulation of Indian gaming.⁴⁴

38. Sullivan, *supra* note 23, at 1124 (noting that as early as 1983 legislators on Capitol Hill were circulating bills to regulate Indian gaming); see also Karen S. McFadden, Note, *The Stakes Are Too High to Gamble Away Tribal Self-Government, Self-Sufficiency, and Economic Development When Amending the Indian Gaming Regulatory Act*, 21 J. CORP. L. 807, 810 (1996) (noting that "Congress enacted the IGRA on October 17, 1988, after nearly five years of proposals and deliberations").

39. 25 U.S.C. §§ 2701–21 (2000); see also Sullivan, *supra* note 23, at 1125.

40. 25 U.S.C. § 2702(1).

41. See, e.g., Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769, 770 (1995) (noting that IGRA "was a political compromise that pleased neither the states nor the tribes"); William Bennett Cooper, III, Comment, *What's in the Cards for the Future of Indian Gaming Law?*, 5 VILL. SPORTS & ENT. L.J. 129 (1998); see also Light & Rand, *supra* note 23, at 271–72 (stating that "IGRA was a compromise among these competing interests: those of the tribes and the federal government, and those of the states and non-Indian gaming interests"); Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 453 (2003) ("Congress enacted IGRA in an effort to balance Indian autonomy in the gaming arena with state assertions of police power over tribal gaming.") (citing S. REP. NO. 100-446, at 6 (1988), *reprinted in* 1998 U.S.C.A.N. 3071, 3076); McFadden, *supra* note 38, at 808.

42. Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming is, generally speaking, gaming that involves "the game of chance commonly known as bingo," *id.* § 2703(7)(A)(i), and "card games that are explicitly authorized by the laws of the State or are not explicitly prohibited by the laws of the State and are played at any location in the State . . ." *Id.* § 2703(7)(A)(i)–(ii). Lastly, Class III gaming is defined as "all forms of gaming that are not [C]lass I gaming or [C]lass II gaming." *Id.* § 2703(8).

43. See Kelly B. Kramer, *Current Issues in Indian Gaming: Casino Lands and Gaming Compacts*, 7 GAMING L. REV. 329 (2003) (noting that Class III gaming is the most lucrative and subject to the most regulations).

44. See generally Cox, *supra* note 41.

Specifically, IGRA provides that "Class I gaming on Indian land is within the exclusive jurisdiction of the Indian tribes" ⁴⁵ A tribe may conduct Class II gaming under IGRA if the "gaming is located within a State that permits such gaming for any purpose by any person, organization or entity" ⁴⁶ Class III gaming, however, is subject to additional regulations that grant the state more authority to regulate gaming on tribal land.

For example, under IGRA,

Class III gaming activities shall be lawful on Indian lands only if such activities are . . . [1] located in a State that permits such gaming for any purpose by any person, organization, or entity, . . . and [2] conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect. ⁴⁷

These compacts are negotiated between the state and the tribe and govern the conduct of Class III gaming. ⁴⁸ In order to execute such a compact, the tribe can request that the state enter into compact negotiations, and "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." ⁴⁹ With this framework in place, Indian gaming has exploded across the nation. ⁵⁰

B. The Rise of Gaming in Wisconsin

Wisconsin tribes have not missed out on the gaming phenomenon. In fact, each of Wisconsin's eleven, federally recognized tribes has en-

45. 25 U.S.C. § 2710(a)(1).

46. *Id.* § 2710(b)(1)(A).

47. *Id.* § 2710(d)(1)(A)–(C).

48. *See id.* § 2710(d)(3).

49. *Id.* § 2710(d)(3)(A).

50. In 1997, Congress formed the National Gambling Impact Study Commission (NGISC), which was charged with the very broad and difficult task of conducting a comprehensive legal and factual study of the social and economic implications of gambling in the United States. NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 6-1 [hereinafter NGISC REPORT], available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html> (last visited Feb. 23, 2006). Pursuant to this study, the NGISC found that in the decade following IGRA (1988–1997), Indian "gaming revenues grew more than 30-fold, from \$212 million to \$6.7 billion." *Id.* at 6-1–6-2. During that same time, traditional commercial casino gambling revenues approximately doubled, "from \$9.6 billion to \$20.5 billion." *Id.* at 6-2. Additional reports from the National Indian Gaming Commission indicate that Indian gaming revenues have continued to increase, with total revenues reaching approximately \$16.7 billion in 2003. *See* National Indian Gaming Commission, Chart: Growth in Indian Gaming, <http://www.nigc.gov/nigc/tribes/revenue-03-95.jsp> (last visited Apr. 25, 2006); *see* National Indian Gaming Commission, Chart: Tribal Gaming Revenues (in thousands) by Region Fiscal Year 2003 and 2002, <http://www.nigc.gov/nigc/tribes/revenue-03-02.jsp> (last visited Apr. 18, 2006). Furthermore, while in 1988 there were only about seventy tribally owned casinos and bingo halls, in 2003 there were 354 tribally owned gaming facilities. National Indian Gaming Association: Indian Gaming Facts, <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml> (last visited Feb. 23, 2006). *See* NGISC REPORT, *supra*, at 6-2.

tered into a gaming compact with the state.⁵¹ Therefore, in order to contextualize *Panzer*, it is necessary to discuss the history of Indian gaming in Wisconsin.⁵²

1. *The Legislature Delegated the Power to Execute Gaming Compacts to the Governor*

Pursuant to IGRA, the Wisconsin Legislature enacted Section 14.035 in 1990.⁵³ Section 14.035 provides in full: "The governor may, on behalf of this state, enter into any compact that has been negotiated under 25 U.S.C. § 2710(d)."⁵⁴ In enacting this law, both the Wisconsin Assembly and Senate rejected amendments requiring legislative approval of any gaming compacts.⁵⁵ Notably, both Mary Panzer and John Gard (the plaintiffs in *Panzer*) voted in favor of Section 14.035 sans the proposed amendments.⁵⁶

2. *The 1992 Original Compacts and Their 1998 Amendments*

In 1992, pursuant to the federal court's decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin* (*Lac du Flambeau*),⁵⁷ which mandated that the governor negotiate with tribes for gaming operations under IGRA, then-Governor Tommy G. Thompson and each Wisconsin tribe formally entered into gaming compacts (Original Compacts).⁵⁸ These Original Compacts limited the permissible Class III gaming operations to slots, blackjack, and pull-tabs or break-open tickets.⁵⁹ Furthermore, each of these Original Compacts contained a provision that limited their duration to seven years with an automatic renewal mechanism that extended the compact for additional five-year terms until one party served written notice of nonrenewal.⁶⁰ Additionally, the Original Compacts provided

51. Department of Administration, State of Wisconsin Indian Gaming & Regulatory Compliance, <http://www.doa.state.wi.us/gaming/index.asp> (last visited Feb. 23, 2006) [hereinafter Wisconsin Indian Gaming and Regulatory Compliance].

52. See *Panzer v. Doyle*, 680 N.W.2d 666, 670 (Wis. 2004) ("To understand the factual and legal issues that affect our decision, we recapitulate our state's unique history with respect to legalized gambling.").

53. See *id.* at 674.

54. WIS. STAT. § 14.035 (2000).

55. See *Panzer*, 680 N.W.2d at 674 (noting that before Section 14.035 was passed, "both houses of the legislature rejected amendments requiring the legislature to ratify these compacts").

56. See *id.* at 718 n.111.

57. 770 F. Supp. 480 (W.D. Wis. 1991).

58. See *id.* at 481.

59. See, e.g., Forest County Potawatomi Community of Wisconsin and State of Wisconsin Gaming Compact of 1992, § IV(A)–(B) (signed June 3, 1992) [hereinafter Original Compact], available at http://www.doa.state.wi.us/docs_view2.asp?docid=2153 (last visited Feb. 23, 2006).

60. See, e.g., *id.* § XXV(A)–(B).

that all of the tribes were to pay a total of \$350,000 to the state, with each tribe contributing a portion that directly related to the amount wagered in each specific tribe's casino(s) as compared to the overall amount wagered in all tribal casinos.⁶¹

When the Original Compacts approached expiration in 1997 and 1998, Governor Thompson realized that gaming revenues created a potential windfall for the state with marginal expenditures.⁶² Accordingly, Governor Thompson refused to renew the gaming compacts unless the tribes made considerable monetary concessions to the state.⁶³ After a lengthy period of negotiations, the Governor and the various tribes eventually reached agreements (1998 Compact Amendments) to amend and continue the Original Compacts.⁶⁴ Under the 1998 Compact Amendments, the State received approximately \$24 million in addition to the \$350,000 already paid under the Original Compacts.⁶⁵

3. *Wisconsin Constitutional Provisions and Statutes Relating to Gambling*

Wisconsin law has evolved significantly over the years with respect to gambling, with many changes taking place within the past fifteen

61. The Potawatomi Compact of 1992 provides:

As soon as all tribes within the State that have requested negotiation of Class III gaming compacts have concluded compacts with the State, the Tribe shall pay to the State, as reimbursement for State costs of regulation under this Compact, an annual amount for each State fiscal year computed as follows: the share of \$350,000 determined by multiplying that amount by a fraction whose denominator is the sum of the gross annual Class III gaming handle of those tribes for the previous fiscal year, and whose numerator is the Tribe's gross annual Class III gaming handle for that same fiscal year.

Id. § XXIV(B).

62. See WIS. LEGISLATIVE AUDIT BUREAU, WISCONSIN GAMING BOARD (1997), available at <http://www.legis.state.wi.us/lab/reports/97-14tear.htm> (indicating that in 1996, total tribal gaming profits in Wisconsin were \$280.1 million and revenues totaled \$682.7 million).

63. See Amy Rinard, *Raise State's Cut or No Tribal Deals, Governor Insists*, MILWAUKEE J. SENTINEL, Jan. 19, 1996, at 1 (reporting that "Gov. Tommy Thompson said Thursday he will not approve new state-tribal gaming compacts unless the state gets more money from Indian tribes. 'I'm not going to sign any extensions of compacts without more money on the table,' Thompson said."); see also *Casino Tribes Get Warning*, CHI. TRIB., Nov. 26, 1997, at M3 (quoting Governor Tommy Thompson as saying "[t]hey're playing with a great deal of fire right now if in fact they call my bluff").

64. See WISCONSIN LEGISLATOR BRIEFING BOOK 2003-04, at P-12 [hereinafter LEGISLATOR BRIEFING BOOK], available at http://www.legis.state.wi.us/lc/02brief/state_tribal.pdf (last visited Oct. 21, 2004). The amendments to each tribe's original compact are available on the Internet. See Wisconsin Indian Gaming and Regulatory Compliance, *supra* note 51.

65. See LEGISLATOR BRIEFING BOOK, *supra* note 64, at P-13.

years.⁶⁶ Today, the Wisconsin state constitution and certain criminal statutes define the scope of permissible gambling activities.⁶⁷ In its original form, however, the Wisconsin state constitution forbid the legislature from ever authorizing a "lottery."⁶⁸ The term lottery was subsequently interpreted by Wisconsin courts and attorneys general to include all forms of gambling.⁶⁹ Then in 1987, the people of Wisconsin ratified a state constitutional amendment which permitted not only a state-owned lottery, but also *pari-mutuel* on-track betting.⁷⁰ Accordingly, the state appeared to be relaxing its position with respect to gambling. But in 1993, the people approved another state constitutional amendment.

This 1993 state constitutional amendment (1993 Constitutional Amendment) provides the current relevant law with respect to gambling and states in part: "Except as provided in this section, the legislature may not authorize gambling in any form."⁷¹ That section of the constitution enumerates the following specific forms of gambling: bingo; raffles; *pari-mutuel* on-track betting; and a State operated lottery.⁷² The constitution goes on to state:

Notwithstanding the authorization of a state lottery under par. (a), the following games, or games simulating any of the following games, may not be conducted by the state as a lottery: 1) any game in which winners are selected based on the results of a race or sporting event; 2) any banking card game, including blackjack, baccarat or chemin de fer; 3) poker; 4) roulette; 5) craps or any other game that involves rolling dice; 6) keno⁷³

In addition to the 1993 Constitutional Amendment, Section 945 criminalizes gambling in general.⁷⁴ Particularly, that law makes it a Class B misdemeanor to place a "bet," which the statute defines as "a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose some-

66. See generally LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN, *The Evolution of Legalized Gambling in Wisconsin*, Res. Bull. 00-1 (2000), available at <http://www.legis.state.wi.us/lrb/pubs/rb/00lb1.pdf>.

67. See WIS. CONST. art. IV, § 24; see also WIS. STAT. § 945 (2004).

68. See *Panzer v. Doyle*, 680 N.W.2d 666, 671 (2004) (citing WIS. CONST. art. IV, § 24 (1848)).

69. See *id.* (citing *Kayden Indus., Inc. v. Murphy*, 150 N.W.2d 447 (Wis. 1967); *State v. Laven*, 71 N.W.2d 287 (Wis. 1955); *State ex rel. Regez v. Blumer*, 294 N.W. 491 (Wis. 1940)).

70. See *id.* at 674-75. "Pari-mutuel Betting" is defined as "[a] form of wagering, generally on the outcome of horse or dog races, whereby all bets made on a particular race are pooled then paid, less a management fee, to holders of winning tickets." BLACK'S LAW DICTIONARY 770 (6th ed. 1991).

71. WIS. CONST. art. IV, § 24(1).

72. *Id.* § 24(3)-(6).

73. *Id.* § 24(6)(c).

74. See WIS. STAT. § 945.02 (2004) (making it a misdemeanor to place a "bet").

thing of value specified in the agreement.”⁷⁵ The statute, however, exempts bets that are placed pursuant to a form of gambling authorized under the 1993 Constitutional Amendment.⁷⁶

4. *The 2003 Doyle Amendments*

In 2002, there was a changing of the gubernatorial guard, which resulted in the incumbent Governor Scott McCallum being defeated by the challenger, Attorney General James E. Doyle, who was considered by many to be gaming-friendly.⁷⁷ Upon entering office, Doyle inherited a large budget shortfall.⁷⁸ Accordingly, Governor Doyle turned to tribal gaming in an attempt to generate more money for the state.⁷⁹ In particular, Doyle sought to increase tribal payments from \$24 million to almost \$240 million.⁸⁰ While the tribes were receptive to higher payments, they demanded concessions from the state, including long-term compacts, higher betting limits, twenty-four hour gaming, and the authority to offer additional casino-style games such as craps, roulette, and poker.⁸¹ On February 19, 2003, Governor Doyle and the Forest County Potawatomi Community of Wisconsin (Potawatomi) agreed to amend the tribe's existing gaming compact (Doyle Amendments).⁸²

While controversy surrounded the Doyle Amendments, including accusations of political favors, it is not disputed that the new amendments had a positive impact on the state's fiscal situation.⁸³ At the same time, the Doyle Amendments permitted unprecedented, full-scale casino operations in the State of Wisconsin.⁸⁴ For example, while the Potawatomi could previously only conduct blackjack, slots, and pull tabs, the Doyle Amendments permitted “[v]ariations on the

75. *Id.* § 945.01(1) (defining “bet”).

76. *See id.* § 945.01(c)–(e).

77. I. Nelson Rose, *Gambling and the Law: Status of Gambling Laws*, 7 GAMING L. REV. 1, 12–13 (2003).

78. *See A New Governor's Message*, MILWAUKEE J. SENTINEL, Jan. 30, 2003, at 14A.

79. *See Amy Rinard, If State Gives a Little, It Can Take More From Casinos, Tribes Say*, MILWAUKEE J. SENTINEL, Feb. 19, 2003, at 1A (quoting Doyle as saying “[a]ll the people of Wisconsin should join me in acknowledging the important efforts the tribes of Wisconsin are making toward helping the state in this difficult time”).

80. *Id.*

81. *Id.*

82. Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended, Feb. 18, 2003 [hereinafter Doyle Amendments], available at http://www.doa.state.wi.us/docs_view2.asp?docid=2155.

83. *See Panzer v. Doyle*, 680 N.W.2d 666, 682 (2004) (noting that “[a]ll the parties acknowledge that the . . . [Doyle Amendments are] projected to generate additional revenue for the state at a time when additional revenue is needed”).

84. *See supra* notes 78–80 and accompanying text.

game of Blackjack, including, but not limited to, Spanish 21 and additional wagers offered in the game of blackjack, including additional wagers, multiple action blackjack, bonus wagers, and progressive blackjack wagers.”⁸⁵ Furthermore, the Doyle Amendments permitted the tribe to operate such games as “roulette or craps, the game of poker or other non-house banked games, or operate games played at Blackjack style tables, such as Let It Ride, Casino Stud, and Casino War”⁸⁶ Accordingly, the Doyle Amendments provided the green light to full scale casino gambling for the Potawatomi.⁸⁷

Most importantly, the Doyle Amendments provided that the “Compact shall continue in effect until terminated by mutual agreement of the parties, or by a duly adopted ordinance or resolution of the Tribe revoking the authority of the Tribe to conduct Class III gaming upon its lands”⁸⁸ On each fifth anniversary of the Doyle Amendments, however, either the Tribe or the state could propose amendments to the compact, and on each twenty-fifth anniversary, “the State, by the Governor as directed by an enactment of a session law by the Wisconsin Legislature, or the Tribe may propose amendments to any provision of the Compact.”⁸⁹ For all intents and purposes, this duration

85. Doyle Amendments, *supra* note 82, ¶ 2(5) (amending section IV.A. of the Original Compact).

86. *Id.* ¶ 2(8). A condition precedent for the operation of these new games was that a “Competitive Facility” must permit such games. *Id.* While one might consider a competitive facility to mean other tribes within Wisconsin, in fact the Doyle Amendments define a “Competitive Facility” as “a facility within the Competitive Market Area outside of the State of Wisconsin where lawful gaming is operated, which would be Class III gaming if the same gaming were operated by an Indian tribe under the Act.” *Id.* ¶ 1(N). Importantly, the “Competitive Market Area” is “the geographical area outside of the State of Wisconsin, and within 75 miles of the State of Wisconsin border.” *Id.* ¶ 1(M) (emphasis added). While seventy-five miles is not a great distance, at least two tribally owned casinos within ten miles of the Wisconsin border operate games of blackjack, Let-It-Ride, craps, roulette, and poker. These two tribes are the Fond du Lac Reservation Business Committee in Duluth, Minnesota (approximately six miles from the Wisconsin border) and the Lac Vieux Desert Band of Lake Superior Chippewa Indians in Watersmeet, Michigan (approximately nine miles from the Wisconsin Border). See Fond-Du-Luth Casino, <http://www.fondduluthcasino.com> (last visited Feb. 23, 2006) (providing information about the Fond du Lac Reservation Business Committee casino); see Lac Vieux Desert Resort Casino, <http://www.lacvieuxdesert.com> (last visited Feb. 23, 2006) (providing information about the Lac Vieux Desert Band of Lake Superior Chippewa Indians’ casino). See also Doyle Amendments, *supra* note 82, ¶ 12(C) (amending section XXIII of the Original Compact).

87. The main Potawatomi casino is located in the Menominee Valley, which in turn is located very near downtown Milwaukee. See Potawatomi Bingo Casino, <http://www.paysbig.com/visitor/directions.htm> (last visited Feb. 24, 2006).

88. See Doyle Amendments, *supra* note 82, ¶ 13(B) (amending section XXV of the Original Compact).

89. *Id.* ¶ 14(D)(2) (amending section XXX of the Original Compact).

provision extended the compacts indefinitely because the Potawatomi had the sole power to withdraw.⁹⁰

For the Potawatomi, the Doyle Amendments did not come cheap. In the first and second year that the Doyle Amendments were to be in effect, the tribe was required to pay \$6.375 million to the state's general revenue fund.⁹¹ In addition, in 2004 and 2005, the tribe would have to pay \$34.125 and \$43.625 million respectively.⁹²

5. Panzer's "Sister Case"—Dairyland Greyhound Park v. Doyle

Before Doyle even had a chance to negotiate the Doyle Amendments, *Dairyland Greyhound Park v. McCallum*⁹³ was working its way through the Wisconsin court system. In that case, Dairyland Greyhound Park (Dairyland Greyhound), the owner of a dog track in southeastern Wisconsin, brought suit seeking "an injunction prohibiting the Governor 'from entering into any new, modified, extended or renewed gaming compacts with any Indian tribe . . . and requiring [him] to issue timely notice of nonrenewal of each compact.'"⁹⁴ In the first reported case, the court of appeals reversed the lower court's dismissal of the case for failure to join the tribes as indispensable parties, and remanded the case for further proceedings.⁹⁵

On remand, the trial court reached the merits of the case in an unreported opinion, and concluded that the 1993 Constitutional Amendment did not affect the gaming compacts or their extension.⁹⁶ Upon appeal, the court of appeals declined to reach the merits of the case, electing instead to usher the matter to the Wisconsin Supreme Court.⁹⁷ In their opinion, the case should be expedited because the "issues involve fundamental questions of state court jurisdiction and the meaning of the 1993 [Constitutional] Amendment."⁹⁸

The Wisconsin Supreme Court accepted the appellate court's invitation but failed to reach a conclusion.⁹⁹ Instead, in a per curiam decision, the supreme court stated that it is "equally divided [3-3] on

90. *Id.* ¶ 13(B).

91. *Id.* ¶ 16(G)(1)(a) (amending section XXXI of the Original Compact).

92. *Id.* ¶ 16(G)(1)(b).

93. 655 N.W.2d 474 (Wis. Ct. App. 2002). Doyle was substituted as the defendant when he defeated McCallum in the gubernatorial election.

94. *Id.* at 477.

95. *Id.* at 487.

96. *Dairyland Greyhound Park, Inc. v. Doyle*, No. 03-0421, 2003 WL 21253354, at 2-3 (Wis. Ct. App. June 2, 2003).

97. *Id.* at 3.

98. *Id.*

99. *Dairyland Greyhound Park, Inc. v. Doyle*, 677 N.W.2d 275, 276 (Wis. 2004).

whether to affirm the judgment of the [trial] court.”¹⁰⁰ Because the supreme court could not overcome the impasse, it remanded the case back to the court of appeals.¹⁰¹ Notably, one justice did not participate in the decision.¹⁰²

At approximately the same time it remanded *Dairyland*, however, the Wisconsin Supreme Court decided *Panzer*. Upon remand of *Dairyland*, the parties submitted new briefs taking *Panzer* into account.¹⁰³ Nevertheless, the court of appeals again declined to reach the merits of the case and for the second time submitted the case back to the supreme court.¹⁰⁴ Finally, on January 13, 2005, the Wisconsin Supreme Court voted to accept the case for decision, and on September 7, 2005, the court heard oral arguments in the matter.¹⁰⁵ Although the court has yet to render its opinion, it is undoubted that *Dairyland* will be a case of extreme importance to the Wisconsin tribes because the court could ostensibly eradicate Indian gaming outright.¹⁰⁶

III. SUBJECT OPINION

In *Panzer v. Doyle*, the issue of Indian gaming became the province of the Wisconsin Supreme Court. This section discusses how the court handled the case in the context of the complex history of Indian gaming in Wisconsin.¹⁰⁷ Furthermore, this section explores the court's conclusions and the appurtenant rationale to those conclusions.¹⁰⁸

A. Relevant Facts and the Issue Presented

The facts of the case reflect the complex history of Indian gaming and politics in Wisconsin.¹⁰⁹ With that background, and the sweeping changes brought about by the Doyle Amendments, it is not surprising

100. *Id.*

101. *Id.*

102. *Id.*

103. *Dairyland Greyhound Park, Inc. v. Doyle*, No. 03-0421, 2004 WL 2522611, at 1 (Wis. Ct. App. Nov. 4, 2004) (noting that the parties had filed new briefs taking *Panzer* into account).

104. *Id.* at 2.

105. See *High Court to Hear Suit Against Casino Gambling; Kenosha Dog Track Owners Want to Block American Indian Tribes From Running Casinos*, WIS. ST. J., Jan. 13, 2005, at B3; see also Matt Pommer, *Will High Court Close Casinos?*, CAP. TIMES, Aug. 29, 2005, at 3A (discussing the September 7, 2005 oral arguments pending before the Wisconsin Supreme Court).

106. Nevertheless, this Note looks at the importance of *Panzer* beyond *Dairyland* because *Panzer* will provide the framework for the compacting process in Wisconsin (assuming the Wisconsin Supreme Court will be unwilling to cut off the spigot of gaming revenue).

107. See *infra* notes 109–116 and accompanying text.

108. See *infra* notes 117–179 and accompanying text.

109. *Panzer v. Doyle*, 680 N.W.2d 666, 670–81 (2004).

that these changes stirred the passions of many state legislators.¹¹⁰ In fact, at the same time that Governor Doyle was negotiating the Doyle Amendments with the Potawatomi, both branches of the Wisconsin Legislature passed multiple bills intending to limit the power of the governor to enter into compacts.¹¹¹ While these bills did not rescind the governor's power to negotiate compacts, they all contained provisions that, in one way or another, mandated legislative approval of the compacts before they were to become effective.¹¹² Doyle, however, vetoed each of these proposed bills and the legislature could not garner enough votes to override the governor's actions.¹¹³ After being rebuffed by the governor's vetoes, Senator Mary Panzer and Representative John Gard (the plaintiffs) sought recourse from the state's highest court.¹¹⁴

In bringing their case, the plaintiffs phrased the main issues as whether the governor exceeded his constitutional authority by agreeing to "amendments that: (1) expand[ed] the scope of gaming by adding games that were previously not permitted for any purpose by any person, organization, or entity in Wisconsin; [and] (2) extend[ed] the duration of the compact indefinitely so that it bec[omes] perpetual"¹¹⁵ Of considerable importance is the fact that the plaintiffs did not challenge the constitutionality of Section 14.035. The court noted, however, that despite the fact they "framed their argument in a man-

110. See *infra* notes 111–114 and accompanying text.

111. See S.B. 41, 2003–2004 Leg., Reg. Sess. (Wis. 2003) (presented to the Governor on February 24, 2003); A.B. 144, 2003–2004 Leg., Reg. Sess. (Wis. 2003) (presented to the Governor on March 14, 2003); A.B. 998, 2003–2004 Leg., Reg. Sess. (Wis. 2004) (presented to the Governor on May 26, 2004).

112. For example, Senate Bill 41 stated that before the governor executed a compact with any tribe, he or she "shall submit the proposed compact to the legislature for approval." S.B. 41 § 2. Similarly, Assembly Bill 144 required legislative approval for any compact "that is for a period longer than 10 years, with a renewal provision of more than 5 years" A.B. 144 § 3.

113. Doyle vetoed Senate Bill 41 on February 28, 2003. History of Senate Bill 41, www.legis.state.wi.us/2003/data/SB41hst.html (last visited Mar. 12, 2006). Doyle vetoed Assembly Bill 144 on March 18, 2003. History of Assembly Bill 144, <http://www.legis.state.wi.us/2003/data/AB144hst.html> (last visited Mar. 12, 2006). Similarly, Doyle vetoed Assembly Bill 998 on May 27, 2004. History of Assembly Bill 998, <http://www.legis.state.wi.us/2003/data/AB998hst.html> (last visited Mar. 12, 2006), and warned the Wisconsin Legislature that they should "move on from this issue, an issue it has lost twice to a veto and once to the Supreme Court." Press Release, Governor Jim Doyle, Governor Doyle Vetoes AB998 (May 27, 2004), available at http://www.wisgov.state.wi.us/journal_media_detail_print.asp?prid=564&lcid=19.

114. Mary Panzer sued in her personal capacity and in her official capacity as the Majority Leader of the Wisconsin Senate. See *Panzer*, 680 N.W.2d at 669. John Gard sued in his personal capacity and in his official capacity as the Speaker of the Wisconsin Assembly. See *id.* *Panzer* was an original action before the Wisconsin Supreme Court. See *id.* at 670. Accordingly, aside from the political background of the case, there was no procedural history. See *id.*

115. *Id.*

ner that avoid[ed] challenging the constitutionality of [that] statute . . . the validity of [the statute] permeates [the] case.”¹¹⁶

B. The Court's Holdings and Rationale

Although the court's fundamental holding was that the governor unlawfully exercised his authority under Section 14.035, the court first embarked on the unraised issue of whether or not Section 14.035 is constitutional.¹¹⁷ To avoid confusion of the various issues, and to understand the interplay between the explicit issues presented to the court and the implicit issues that underlie the opinion, this section breaks down the majority opinion into its analysis of Section 14.035 and then its analysis of the compact provisions.

1. Section 14.035 Is Not Unconstitutional

As the court indicated, although the plaintiffs did not challenge the facial validity of Section 14.035, that question nevertheless “permeates” the case.¹¹⁸ After all, if the court were to find that the statute was in fact unconstitutional, the remaining issues would be rendered moot.¹¹⁹ The court found, however, that despite “the legislature’s exceptionally broad delegation of power to the Governor . . . [Section] 14.035 is not unconstitutional beyond a reasonable doubt.”¹²⁰

Central to that finding was the question of which branch of government possessed the authority to bind the state to gaming compacts before Section 14.035 was enacted.¹²¹ Relying upon cases from other jurisdictions, the majority concluded that “committing the state to policy choices negotiated in gaming compacts constitutes a legislative function.”¹²² Therefore, absent Section 14.035, the court stated that “the power to enter into compacts under IGRA would reside with Wisconsin’s legislative branch.”¹²³ The legislature, however, dele-

116. *Id.* at 686.

117. *Panzer*, 680 N.W.2d at 670, 687.

118. *Id.* at 686.

119. If the statute was unconstitutional, then, a fortiori, the governor’s actions pursuant to that statute would also be unconstitutional.

120. *Panzer*, 680 N.W.2d at 687.

121. *Id.*

122. *Id.* at 687–88. The court cited decisions interpreting Arizona, Kansas, New Mexico, New York, and Rhode Island laws and noted that those courts had “concluded that entering into a tribal-state compact under IGRA, thereby committing the state to a particular position with respect to Indian gaming, involves subtle and important decisions regarding state policy that are at the heart of legislative power.” *Id.* at 687.

123. *Id.* at 688.

gated that authority to the governor in Section 14.035. Accordingly, the court next had to consider whether that delegation was lawful.¹²⁴

In order to answer that question, the majority turned to the state's judicially developed "nondelegation doctrine," which generally permits one branch of government to delegate an area of authority to another branch of government provided that it does not delegate too much.¹²⁵ Under that doctrine, the court noted that their review considers "both the nature of delegated power and the presence of adequate procedural safeguards, giving less emphasis to the former when the latter is present."¹²⁶ Drawing upon cases in which the legislature delegated authority to an administrative agency, the court stated that when the legislature delegates power to another body of government, "it is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to *maintain some legislative accountability over rule-making*."¹²⁷ Transporting that principle into its analysis of Section 14.035, the court declared that "it is crucial for the legislature to preserve the right to exercise some degree of control over the delegated power."¹²⁸

With that groundwork laid, the court first noted that the statute "indisputably delegate[d] a broad and expansive power to the Governor," and then concluded that it did not "express clear policy objectives or include explicit procedural safeguards."¹²⁹ Nevertheless, the court reasoned that "[s]o long as the legislature retains the power to act on Indian gaming, there are procedural safeguards to assure that the governor acts 'within that legislative purpose.'"¹³⁰ Turning to Section 14.035, the court found that procedural safeguards existed in the following forms:

First, apart from the extraconstitutional techniques of leverage and communication between branches, the legislature retains the power to repeal [Section] 14.035 if it is able to muster enough votes to override a gubernatorial veto. This blunt instrument could recapture the power delegated to the governor. Second, the legislature may seek to amend [Section] 14.035 to require the ratification of compact extensions or amendments, direct the governor to seek specific terms, or express a desire to nonrenew. Finally, the legislature may appeal to public opinion. The governor of Wisconsin is a

124. See *infra* notes 125–133 and accompanying text.

125. *Panzer*, 680 N.W.2d at 684.

126. *Id.* at 685.

127. *Id.* at 686 (citing *Martinez v. Dep't of Indus., Labor & Human Relations*, 478 N.W.2d 582 (Wis. 1992)) (internal quotation marks omitted).

128. *Id.*

129. *Id.* at 688.

130. *Id.*

highly visible public official and the governor's decisions on Indian gaming will attract the attention of the public and the news media. If the governor makes a policy choice that is unacceptable to the people, the governor will be held accountable to the people.¹³¹

The court went on to say that "[i]n sum, although the statute is not a model of legislative delegation, its purpose is ascertainable, and in most situations there are safeguards available to alter the policy choices made by the governor."¹³² Based on this rationale, the majority found Section 14.035 to be a constitutional delegation of authority.¹³³

2. *The Doyle Amendments Are Invalid*

Notwithstanding the fact that the court found Section 14.035 to be a constitutional delegation of power, the court went on to find that each of the contested provisions of the Doyle Amendments was the result of an invalid exercise of that delegated power.¹³⁴

a. *The Duration Provision*

The plaintiffs attacked the duration provision of the Doyle Amendments on the ground that "the Governor ha[d] neither inherent nor delegated authority to agree to compact terms that place matters of public policy and statecraft outside of the legislature's ability to influence."¹³⁵ In their view, because the Doyle Amendments essentially lasted in perpetuity, future legislatures and future governors would be irrevocably bound to the compacts.¹³⁶ Doyle, however, responded that the legislature, by enacting Section 14.035, intended to grant him such broad authority.¹³⁷ Furthermore, the governor pointed to similar agreements, such as interstate compacts, as an example of the State binding itself indefinitely.¹³⁸ Beyond interstate compacts, the parties agreed that Colorado, Connecticut, Idaho, Kansas, Minnesota, and Mississippi all have similar provisions.¹³⁹

A majority of the court, however, rejected Doyle's arguments. Specifically, the majority dismissed the argument that the gaming compacts are similar to interstate compacts by simply stating "the fact that

131. *Panzer*, 680 N.W.2d at 689.

132. *Id.*

133. *Id.*

134. *See id.* at 701.

135. *Id.* at 690.

136. *Id.*

137. *Panzer*, 680 N.W.2d at 690.

138. *Id.*

139. *Id.* at 691.

a *state* may, under the federal constitution, bind itself to another *state* as a matter of federal law, does not mean that a *governor* may bind the state to a gaming compact with an Indian tribe indefinitely and without notice to or approval by the legislature.”¹⁴⁰ As for the other jurisdictions with indefinite compacts, the majority noted that those states lacked appellate decisions regarding such provisions, and without such decisions the court was “unable to speculate as to whether these indefinite compacts comport with the law of their respective jurisdictions, much less Wisconsin.”¹⁴¹

In agreeing with the plaintiffs, the majority related the discussion back to the nondelegation doctrine, saying that “[t]he concern is that the Governor unexpectedly gave away power delegated to him so that the legislature cannot take it back.”¹⁴² By doing so, the court reasoned, the governor circumvented the “implicit” procedural safeguards of Section 14.035.¹⁴³ This is because “[t]he legislature would be powerless” to influence any future compact negotiations because the Doyle Amendments effectually preclude such negotiations.¹⁴⁴ Similarly, voters could not exercise their electoral influence on the governor because they would be unable to elect a future governor who could alter the already agreed upon compact terms.¹⁴⁵ Accordingly, the majority concluded that Section 14.035 did not grant the governor the authority to agree to a gaming compact of indefinite duration because such a provision nullified the “implicit” procedural safeguards that the majority found to sustain the statute’s constitutionality.¹⁴⁶

b. Expansion of Permissible Class III Gaming

The crux of the plaintiffs’ argument against the provision within the Doyle Amendments that expanded the scope of permissible gaming activities was that the 1993 Constitutional Amendment prohibited any governmental body, including the governor, from agreeing to new games that are expressly prohibited by law.¹⁴⁷ In response, Doyle

140. *Id.*

141. *Id.*

142. *Id.* at 690.

143. *Panzer*, 680 N.W.2d at 690–91.

144. *Id.* at 691.

145. *Id.*

146. *Id.* at 692.

147. *Id.* Originally, the plaintiffs expressly declined to take a position as to whether the legislature could agree to games prohibited by constitutional amendment. *Id.* at 692–93. The court, however, requested additional briefs on the matter, and the parties eventually agreed that if the state constitution made certain games off limits, it did not matter whether the governor or the legislature was the decision-maker. *Panzer*, 680 N.W.2d at 692–93.

contended that the state constitution did “not prevent him from entering into a compact for additional types of games.”¹⁴⁸ Rather, as Doyle argued, state law provided only the basis for the compact negotiations—those games that he was required to negotiate—and he was free to negotiate games beyond that minimum threshold.¹⁴⁹

Crucial to resolving this issue was a statutory interpretation of IGRA.¹⁵⁰ In construing IGRA, the majority found *American Greyhound Racing, Inc. v. Hull*¹⁵¹ to be highly persuasive.¹⁵² In that case, an Arizona district court faced an argument similar to Doyle’s and concluded:

The court conceives this question as whether IGRA establishes a ceiling for compact terms, or a floor. That is, whether IGRA permits states to offer only such games that are legal for any person for any purpose (a ceiling), or whether IGRA requires states to offer tribes terms equal to those granted their own citizens, plus allows states to agree to any additional gaming (a floor). For the reasons that follow, the court believes a ceiling view is mandated.¹⁵³

Using *American Greyhound* as a springboard, the *Panzer* majority turned to the statutory language of IGRA, which states that “class III gaming activities *shall be lawful* on Indian lands *only if* such activities are . . . located in a State that *permits such gaming* for any purpose by any person, organization or entity.”¹⁵⁴ According to the majority, this language supports the conclusion reached by the court in *American Greyhound*—that there are “two categories of Class III games: [t]hose over which a state *must* negotiate with a tribe and those that are illegal to negotiate.”¹⁵⁵ Under the statutory language, those games that the state *must* negotiate over “are games permitted ‘for any purpose by any person, organization, or entity’”¹⁵⁶ On the other hand, the

148. *Id.* at 693.

149. *Id.* at 693–94.

150. *See id.* at 693–94 n.35 (discussing a speech given by then Attorney General Doyle at the Federal Indian Law Seminar relating to changes in state law subsequent to the implementation of compacts).

151. *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067–68 (D. Ariz. 2001), vacated on other grounds, 305 F.3d 1015 (9th Cir. 2002).

152. *Panzer*, 680 N.W.2d at 694 (stating that the district court’s analysis in *American Greyhound* is “persuasive”).

153. *Id.* (citing *American Greyhound*, 146 F. Supp. 2d at 1067).

154. *Id.* at 695 (quoting 25 U.S.C. § 2710(d)(1)(B) (2000)) (internal quotation marks omitted).

155. *Id.*

156. *Id.* (quoting 25 U.S.C. § 2710(d)(1)(B)) (internal quotation marks omitted).

majority determined, the state cannot negotiate over games that are illegal in Wisconsin.¹⁵⁷

Therefore, the question turned upon whether Wisconsin law permitted the new games compacted for under the Doyle Amendments—namely, keno, roulette, craps, and poker.¹⁵⁸ After reviewing the history of the prohibitions on gambling in Wisconsin, the court concluded that “[b]lackjack and other varieties of banking card games, poker, roulette, craps, keno and slot machines are all games specifically outside the scope of [the 1993 Constitutional Amendment].”¹⁵⁹ In other words, the 1993 Constitutional Amendment (coupled with Section 945) exemplifies the state’s public policy against gambling in general and the expressly prohibited games in particular.¹⁶⁰ Accordingly, the majority held that “the Governor’s agreement to the additional games of keno, roulette, craps, and poker in 2003 was contrary to criminal/prohibitory sections of state law in addition to the constitution.”¹⁶¹

C. *Dissenting Opinion*

The three dissenting justices began their opinion with the ominous summation that “All Bets are Off.”¹⁶² Thereafter, the dissent found that both Section 14.035 and the governor’s actions pursuant to that statute were constitutional.¹⁶³ Accordingly, the dissent concluded that each of the compact provisions that the majority struck down was valid.¹⁶⁴

The dissent agreed with the majority that Section 14.035 is constitutional.¹⁶⁵ They took issue, however, with the majority’s reading of “implicit limits” into the statute.¹⁶⁶ In particular, the dissent found no “implicit” limits on the governor’s wholly valid authority under Section 14.035.¹⁶⁷ Rather, the governor’s authority is expressly limited

157. *Id.* at 696 (stating that “the continued vitality of *Lac du Flambeau*’s holding is very doubtful, and the decision’s statements regarding Wisconsin’s policy toward gaming have been seriously undercut by the 1993 [Constitutional] Amendment”).

158. *Panzer*, 680 N.W.2d at 695–97.

159. *Id.* at 696.

160. *Id.*

161. *Id.* at 697.

162. *See id.* at 701 (Abrahamson, C.J., joined by Bradley, J., and Crooks, J., dissenting).

163. *See infra* notes 165–179 and accompanying text.

164. *See infra* notes 165–179 and accompanying text.

165. *Panzer*, 680 N.W.2d at 707 (Abrahamson, C.J., joined by Bradley, J., and Crooks, J., dissenting).

166. *Id.* at 707–09. The dissent stated in poetic fashion: “[i]t is not clear from whence cometh these ‘implicit limits’” *Id.* at 708.

167. *Id.* at 709.

only by IGRA, which Section 14.035 explicitly incorporates.¹⁶⁸ Using those premises, the dissent tackled the compact provisions.

According to the dissent, the duration provision is valid because it will not last in perpetuity—instead it provides for gaming regulation amendments every five years, and the parties can amend “any provision of the compact every twenty-five years.”¹⁶⁹ Furthermore, the dissent argued that the Doyle Amendments “actually place the legislature in a better position” than the original compacts because after twenty-five years, the legislature can enact a law that directs the governor to propose an amendment to the compact.¹⁷⁰

Similarly, the dissent concluded that the provision which expanded the additional scope of permitted gaming was also valid.¹⁷¹ In analyzing the validity of the additional games provision, the dissent’s focal point was that the Original Compact expressly states: “To the extent that State law or Tribal ordinances, or any amendments thereto, are inconsistent with any provision of this Compact, this Compact shall control.”¹⁷² The dissent read this language as the parties clear “intent to be bound by the” law as it existed in 1992.¹⁷³ Based on this conclusion, the pertinent question did not become what games could the governor negotiate over in 2003, but rather what games could the governor negotiate over in 1992.¹⁷⁴ To answer this question, the dissent turned to the controlling judicial opinion of that time, *Lac du Flambeau*.¹⁷⁵ In that case, a federal district court, applying the *Cabazon* criminal/prohibitory-civil/regulatory analysis, determined that the state must negotiate with the tribe over any games.¹⁷⁶ Accordingly, the governor was well within his rights when he compacted for additional forms of gaming.¹⁷⁷

Furthermore, the dissent argued that despite the fact that the law in Wisconsin changed in regards to gambling, the compact was not affected due to the impairment of contracts clauses in the Wisconsin and

168. *Id.*

169. *Id.* at 715.

170. *Panzer*, 680 N.W.2d at 716 (Abrahamson, C.J., joined by Bradley, J., and Crooks, J., dissenting).

171. *Id.* at 718.

172. *Id.* (quoting Original Compact) (internal quotation marks omitted).

173. *Id.*

174. *Id.* at 718–19.

175. *Id.* at 718.

176. *Panzer*, 680 N.W.2d at 718–19 (Abrahamson, C.J., joined by Bradley, J., and Crooks, J., dissenting) (citing *Lac du Flambeau Band of Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 488 (W.D. Wis. 1991)).

177. *See id.* at 722.

United States Constitutions.¹⁷⁸ After applying a lengthy impairment of contracts analysis, the dissent stated: “[T]he majority’s application of the 1993 [C]onstitutional [A]mendment substantially impairs the contractual relationship and . . . [therefore] we conclude that the majority’s decision violates the impairment of contracts clause.”¹⁷⁹

IV. ANALYSIS

The *Panzer* opinion is complex, and unfortunately from a legal perspective, the political undertones make it difficult to flesh out the issues. Careful analysis, however, shows that the majority opinion was founded upon the invalid premise that Section 14.035’s constitutionality is sustained by implicit procedural safeguards.¹⁸⁰ This invalid premise infiltrates the majority’s discussion of the duration provision, thus creating an inherent flaw in that analysis.¹⁸¹ Lastly, the majority misconstrues IGRA by concluding that the state may only compact over games that are expressly legal.¹⁸²

A. *The Majority Improperly Read “Implicit” Procedural Safeguards Into Section 14.035*

In order to save the constitutionality of Section 14.035, the majority wrongly read implicit limits into the statute. These limits are supported by neither case law nor the statute itself.¹⁸³ According to the majority, Section 14.035 did not violate separation of powers principles because certain implicit procedural safeguards exist to sustain the constitutionality of the statute.¹⁸⁴ In reaching the conclusion that the statute was constitutional, the majority worked under the assumption that the fundamental power to enter into gaming compacts under IGRA was a power vested in the legislature.¹⁸⁵ The dissent agreed

178. *Id.* at 724.

179. *Id.*

180. See *infra* notes 183–219 and accompanying text.

181. See *infra* notes 220–231 and accompanying text.

182. See *infra* notes 232–282 and accompanying text.

183. This author recognizes that by finding Section 14.035 unconstitutional, the court would severely undermine the legitimacy of the original 1992 compacts because those compacts would have been executed pursuant to an unconstitutional delegation of power. As will be argued later in this Note, this would have serious ramifications for Indian gaming because of *Dairyland*. See *infra* notes 220–231 and accompanying text. Assuming that neither the majority nor the dissent want to abolish Indian gaming in Wisconsin, it seems that both would be willing to find the statute constitutional at all costs.

184. *Panzer*, 680 N.W.2d 666 at 689.

185. *Id.* at 688 (concluding that “in the absence of Section 14.035, the power to enter into compacts under IGRA would reside with Wisconsin’s legislative branch”). This Note does not address whether this is a valid assumption. It is worthwhile to note, however, that IGRA is

with the majority.¹⁸⁶ The majority, however, viewed the constitutionality of the statute through the lens of the "nondelegation doctrine."¹⁸⁷ Under that doctrine, the legislature can delegate its legislative function to another branch of government provided procedural safeguards exist such that the legislature "maintain[s] some accountability over rule-making."¹⁸⁸

As applied to Section 14.035, the majority found three implicit safeguards.¹⁸⁹ First, the legislature can repeal the law if it can garner "enough votes to override a gubernatorial veto."¹⁹⁰ Second, the legislature could amend the law to require legislative approval.¹⁹¹ Third, the legislature may appeal to the public, who in turn can hold the governor accountable for any ill-advised policy choices he or she may make.¹⁹² Besides the fact that the majority cited no precedent for this form of statutory interpretation (i.e., reading implicit limits into the statute), a common-sense analysis of these "safeguards" shows that they do not in fact permit the legislature to "maintain some legislative accountability over rule-making" because such safeguards exist in almost any law.¹⁹³ Furthermore, the fact that the legislature could re-

silent as to whether compacting is a legislative or executive function (or both). See 25 U.S.C. § 2701 (2000).

186. *Panzer*, 680 N.W.2d at 714 (Abrahamson, C.J., joined by Bradley, J., and Crooks, J., dissenting) (stating that "we conclude that Wis Stat §14.035 constitutes a valid delegation of authority to the governor"). Although not explicitly stating that the power to bind the state to compacts with tribes inheres in the legislature, the dissent's conclusion that the statute validly delegates that power to the governor acts as an admission to this point.

187. *Id.* at 684 (majority opinion).

188. *Id.* at 686 (quoting *Martinez v. Dep't of Indus., Labor & Human Relations*, 478 N.W.2d 582, 587 (Wis. 1992)) (internal quotation marks omitted).

189. *Id.* at 689.

190. *Id.*

191. *Id.*

192. *Panzer*, 680 N.W.2d at 689.

193. *Id.* at 686 (quoting *Martinez*, 478 N.W.2d at 587) (emphasis omitted) (internal quotation marks omitted). For example, common sense tells us that the fact that the legislature may repeal the statute provides no support for the proposition that it has retained "some power to act on Indian gaming" under the statute. Likewise, the fact that it can amend the law does not support the conclusion that the legislature has the power under the current law to act on Indian gaming. Rather, both perceived "safeguards" support the conclusion that the legislature cannot act at all pursuant to Section 14.035. The "public opinion" safeguard suffers a similar shortcoming because it evinces the fact that the legislature has not retained any control over gaming; in order to influence the governor, the legislature must turn to the general public to exert its political influence. Again, notwithstanding the fact that the legislature can appeal to public opinion to sway the governor's policy choices, it is not necessarily true that the legislature has maintained accountability over rule-making. In sum, common sense dictates that none of these three "implicit procedural safeguards" gives the legislature the power to act on gaming under the current statute. By reading these implicit safeguards into the statute, the majority went beyond most methods of statutory interpretation, which generally look at the text and legislative history of the statute. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS

peal or amend Section 14.035 does not mean that it may unravel events that have already occurred; such action could only affect future compact negotiations. Similarly, appealing to public opinion would not protect the legislature because the public can only hold the governor accountable by voting him or her out of office.

The majority also fallaciously applied separation of powers principles to determine that Section 14.035 was constitutional. At the outset of its analysis, the majority examined only two cases regarding legislative delegation of power to another government entity.¹⁹⁴ The first case, *Gilbert v. Medical Examining Board*,¹⁹⁵ “addressed the issue of whether the legislature had delegated too much power to an executive branch agency.”¹⁹⁶ In that case, the Wisconsin Supreme Court upheld a statute that delegated authority to the Medical Examining Board to: “investigate allegations of unprofessional conduct” by licensed medicals; conduct hearings regarding such allegations; and ultimately take action as the board deemed necessary.¹⁹⁷ In so holding, the court emphasized:

[T]here are intrinsic safeguards within the procedure the Board itself must follow upon receiving an allegation of unprofessional conduct. The Board must first investigate the allegation and, upon a finding of *probable cause* to believe that a person is guilty of such conduct, conduct a hearing before the Board prior to any action which may be taken concerning reprimand, suspension, etc. Thus, due process requirements are met. . . . Further, the Board is empowered to adopt rules concerning the procedures it will follow for such investigations and hearings pursuant to ch. 227, Stats. This court has already noted that a delegation of rule-making authority which is attended by the safeguards under ch. 227, Stats., requiring public hearings and the opportunity for the challenge of its rules in court, is a sufficient procedural safeguard.¹⁹⁸

Based on those procedural safeguards, the court concluded that the statute was a valid delegation of power.¹⁹⁹ After *Gilbert*, the *Panzer* court went on to discuss *Martinez v. Department of Industry, Labor & Human Relations*,²⁰⁰ which held that the legislature retained the right to review rules promulgated by an administrative agency when that

AND THE LAW (1997), for a thorough discussion of the competing principles regarding statutory interpretation.

194. *Panzer*, 680 N.W.2d at 685–86.

195. *Gilbert v. Med. Examining Bd.*, 349 N.W.2d 68 (Wis. 1984).

196. *See Panzer*, 680 N.W.2d at 685 (discussing *Gilbert*, 349 N.W.2d 68).

197. *Gilbert*, 349 N.W.2d at 78.

198. *Id.*

199. *Id.* at 84.

200. *Martinez v. Dep't of Indus., Labor & Human Relations*, 478 N.W.2d 582 (Wis. 1992).

agency was acting pursuant to a legislative grant of authority.²⁰¹ In reaching that conclusion, the court noted that "[l]egislative power may be delegated to an administrative agency as long as adequate standards for conducting the allocated power are in place."²⁰²

Noticeably missing from the majority's analysis were *State ex rel Attorney General (Tavern Code Authority)*²⁰³ and *State ex rel Attorney General v. Wisconsin Constructors (Wisconsin Constructors)*,²⁰⁴ two cases that addressed the issue of whether the legislature can delegate legislative authority directly to the governor.²⁰⁵ In *Tavern Code Authority*, the Wisconsin Supreme Court considered whether the legislature properly granted authority to the governor "to investigate, ascertain, declare and prescribe reasonable codes or standards of fair competition and trade practices"²⁰⁶ The statute in question also required that the governor declare such codes only after reasonable public notice, and furthermore, only if such codes were "not designed to promote monopolies or to eliminate or oppress small enterprises [and] . . . not inequitable and that the interests of the consumer and the general public will be protected . . . [and] . . . necessary for the stabilization of the [particular business or industry]."²⁰⁷ En route to concluding that this statute was in fact constitutional, the court reasoned that the law's detailed requirements provided "the requisite and necessary standard to guide the Governor in the exercise of the power conferred upon him."²⁰⁸

In a companion case, *Wisconsin Constructors*, the Wisconsin Supreme Court examined the validity of a different section of the same statute.²⁰⁹ The specific section in question permitted the governor to collect "assessments sufficient to reimburse the state for the expenses incurred by it in connection with the initial promulgation of the code [and] . . . expenses incurred by any code authority or administrative agency"²¹⁰ Similar to the *Tavern Code Authority* opinion, the court in *Wisconsin Constructors* concluded that the language of the statute provided a "sufficient legislative standard . . . for the Governor's guidance"²¹¹

201. *Id.* at 587.

202. *Id.* at 585.

203. *State ex rel. Attorney General (Tavern Code Authority)*, 264 N.W. 633 (Wis. 1936).

204. *State ex rel. Attorney General v. Wisconsin Constructors*, 268 N.W. 238 (Wis. 1936).

205. See *infra* notes 206–211 and accompanying text.

206. *Tavern Code Authority*, 264 N.W. at 635 n.1 (citing WIS. STAT. § 110 (1935)).

207. *Id.*

208. *Id.* at 638.

209. *Wisconsin Constructors*, 268 N.W. at 240.

210. *Id.* (citing WIS. STAT. § 110.08 (1935)).

211. *Id.* at 242.

Based on these two cases, it becomes evident that the legislature can delegate authority to the governor, but that delegation must be accompanied by sufficient standards to guide the governor's actions.²¹² Coupling the "sufficient standards" rationale with the "procedural safeguards" required in legislative delegations to administrative agencies, it is evident that the empowering statute must contain some explicit safeguards that curtail or guide the governor's exercise of authority pursuant to that delegation.²¹³ Section 14.035 contains such explicit safeguards and guidance by expressly incorporating IGRA into the statute.²¹⁴ As the statute clearly states: "The governor may, on behalf of this state, enter into any compact that has been negotiated under 25 U.S.C. 2710(d)." ²¹⁵ Accordingly, while the governor has been delegated broad authority under Section 14.035, that authority is expressly limited by the comprehensive scheme set forth in IGRA relating to compacts.²¹⁶

The majority, however, chose to ignore the *explicit* safeguards contained in Section 14.035 in favor of implicit procedural safeguards.²¹⁷ Its action is unsupported by the case law and contravenes conventional statutory interpretation.²¹⁸ Furthermore, by incorporating the implicit procedural safeguards into the statute, the majority created an invalid premise for its analysis of the duration provision.²¹⁹

B. The Majority's Analysis of the Duration Provision Creates a Circular Argument

The majority's conclusion that the duration provision is invalid because it circumvents the implicit procedural safeguards is supported

212. See *Tavern Code Authority*, 264 N.W. at 642 (upholding statute that delegated legislative power to the governor because statute set forth sufficient standards to guide his exercise of power); see also *Wisconsin Constructors*, 268 N.W. at 242 (holding that legislative grant of authority to governor was valid because statute contained "sufficient legislative standard[s] . . . for the Governor's guidance").

213. See *Gilbert v. Med. Examining Bd.*, 349 N.W.2d 68, 78 (Wis. 1984); see also *Tavern Code Authority*, 264 N.W. at 638.

214. See WIS. STAT. § 14.035 (2003).

215. *Id.*

216. See 25 U.S.C. § 2710(d) (2000). IGRA sets forth a highly complex scheme which provides for the manner in which Class III gaming can be operated. One requirement is that Class III gaming be conducted through a compact between the state and the tribe, and IGRA sets forth lengthy requirements regarding how the compact can be negotiated and what may be included in it. See 25 U.S.C. § 2710(d)(3)(A)–(C).

217. See *supra* notes 183–192 and accompanying text.

218. See *supra* notes 193–216 and accompanying text.

219. See *infra* notes 220–231 and accompanying text.

by no authority and it ultimately creates a circular argument.²²⁰ In this case, the majority concluded that the “legislature ha[d] not delegated to the Governor the authority to agree to a duration provision that circumvents the procedural safeguards that sustain the legislature’s ability to delegate that power in the first place.”²²¹ The initial problem with this conclusion is that the majority failed to cite any authority to support it.²²² Rather, the majority simply came to the bald conclusion that the legislature must not have intended to delegate such broad authority to the governor, despite the fact that when the legislature ratified Section 14.035, it specifically rejected amendments that would have required legislative oversight of gaming compacts.²²³

Beyond the fact that the majority cited no authority, its reasoning and conclusion contain an inherent logical flaw—they create a circular argument. As the majority indicates, Section 14.035 is a very broad delegation of power to the governor.²²⁴ Assuming that the duration provision does allow the compact to endure indefinitely, the majority cannot logically maintain that the statute is constitutional but the duration provision is invalid. To overcome that obstacle, the majority engages in circular reasoning.

Looking to their reasoning, the majority stated: “[T]he concern is that the Governor unexpectedly gave away power delegated to him so that the legislature cannot take it back. This action circumvents the procedural safeguards that insure that delegated power may be curtailed or reclaimed by future legislative action.”²²⁵ Under this reasoning, the majority’s premise—“that the Governor unexpectedly gave away power delegated to him so that the legislature cannot take it back”—was the same as its conclusion—that such “action circumvents the procedural safeguards that insure that delegated power may be curtailed or reclaimed by future legislative action.”²²⁶ Stated another way, the majority argued that the governor circumvented the procedural safeguards and therefore circumvented the procedural safeguards.

220. See *infra* notes 221–231 and accompanying text. This Note does not attempt to address the wisdom of the duration provision contained in the Doyle Amendments. As a practical observation, however, it seems logical (and perhaps preferable) that the governor, on behalf of the state, would want to retain some power to renegotiate or terminate the compact in the future.

221. *Panzer v. Doyle*, 680 N.W.2d 666, 692 (Wis. 2004).

222. See *id.* at 689–92.

223. See *supra* notes 54–55 and accompanying text.

224. As the majority stated: “[Section] 14.035 indisputably delegates a broad and expansive power to the Governor.” *Panzer*, 680 N.W.2d at 688.

225. *Id.* at 690.

226. *Id.*

As this demonstrates, the majority's premise contains its conclusion—a circular argument.

This circularity provides further support for the argument that the majority improperly read implicit procedural safeguards into Section 14.035 instead of recognizing the statute's reference to IGRA as an *explicit* procedural safeguard.²²⁷ Had the majority recognized the statute's explicit procedural safeguards, then it would have been compelled to reach the conclusion that the duration provision was in fact valid because IGRA does not limit the duration of compacts.²²⁸ Specifically, IGRA contains extensive guidelines as to how the state and tribes may go about the compacting process and furthermore what may be included in a compact.²²⁹ It is important to note that IGRA neither limits nor proscribes the permissible duration of the compacts.²³⁰ Because IGRA is the vehicle by which Indian gaming can legally operate, its silence as to the permissible length of the compacts is strong evidence that the duration provision within the Doyle Amendments is valid (although perhaps not wise).²³¹

C. The Majority Misinterpreted IGRA and Consequently Rendered the Compacting Process Meaningless

Next, the majority leapt to the realm of federal law—namely, IGRA—to conclude that the Governor cannot agree to a compact provision that expands the permissible scope of Class III gaming in Wisconsin.²³² In doing so, the majority misconstrued IGRA to determine that the Governor had authority only to negotiate over games that are explicitly permitted by Wisconsin law.²³³ This conclusion is unfounded because IGRA, by way of incorporating the Supreme Court's analysis in *Cabazon*, requires a court to look at whether the state has embodied a regulatory approach to all forms of gambling, as opposed to a prohibitory approach to all forms of gambling.²³⁴ Under

227. See *supra* notes 214–216 and accompanying text.

228. See 25 U.S.C. § 2710(d)(3) (2000) (outlining the compacting process and what may be included in a gaming compact).

229. *Id.* § 2710(d)(3)(C)(i)–(vii) (outlining provisions that may be included in a gaming compact).

230. See *generally id.* § 2710(d).

231. See *id.* § 2702 (indicating that two purposes of IGRA are to “provide a statutory basis for the operation of gaming by Indian tribes . . . [and] a statutory basis for the regulation of gaming by an Indian tribe”).

232. *Panzer v. Doyle*, 680 N.W.2d 666, 696 (Wis. 2004).

233. See *supra* notes 147–161 and accompanying text.

234. See *generally supra* notes 26–37 and accompanying text.

a *Cabazon* analysis, Wisconsin clearly regulates gambling; the Governor had the authority to negotiate over any type of Class III games.²³⁵

In *Panzer*, the majority misinterpreted IGRA by concluding that the Governor was without authority to negotiate over additional forms of Class III gaming.²³⁶ With respect to the specific provision in the Doyle Amendments, the majority concluded: "The new casino-style games that the Governor agreed to in 2003 are expressly forbidden by statute. Thus, the Governor was without authority to agree, on behalf of the state, to add variations on blackjack, electronic keno, roulette, craps, poker and other non-house banked card games under the [Doyle Amendments]."²³⁷ Central to this conclusion was a statutory interpretation of IGRA.²³⁸

The pertinent provision of IGRA states that Class III gaming activities shall be lawfully conducted on Indian lands only if such activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity"²³⁹ According to the majority, this statutory language means that the State must explicitly permit each specific form of Class III gaming before any tribe can conduct that particular form of gaming.²⁴⁰ As the majority described, this interpretation corresponds to the "ceiling" view of IGRA, which means that the state may negotiate only over gaming that is explicitly permitted by state law.²⁴¹ In support of this conclusion, the majority relied on *American Greyhound*, *Rumsey Indian Rancheria of Wintun Indians v. Wilson*,²⁴² and *Cheyenne River Sioux Tribe v. South Dakota*.²⁴³

These three cases all reached a conclusion that is consistent with the majority's analysis.²⁴⁴ The *Rumsey* court succinctly stated that conclusion as follows:

235. See *infra* notes 251–259 and accompanying text.

236. See *Panzer*, 680 N.W.2d at 697.

237. *Id.*

238. See *id.* at 695 (noting that the "ultimate inquiry focuses on the 'permits such gaming' language in [IGRA]").

239. 25 U.S.C. § 2710(d)(1)(B) (2000).

240. See *Panzer*, 680 N.W.2d at 694 (citing *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067–68 (D. Ariz. 2001)). As the *Panzer* majority stated, the "District Court in *American Greyhound* concluded that IGRA does not permit a state to enter into compacts authorizing tribes to engage in gaming otherwise prohibited by state law." *Id.*

241. *Id.* at 695.

242. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994).

243. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993).

244. See *Rumsey Indian Rancheria*, 64 F.3d at 1258; see also *Cheyenne River Sioux*, 3 F.3d at 279 ("The 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit."); *American Greyhound*, 146 F. Supp. 2d at 1067 (concluding that under § 2710(d)(1) "a compact cannot make legal [C]lass III gaming not otherwise permitted by state law. . . . Federal courts have adopted what

IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity "for any purpose by any person, organization, or entity," then it also must allow Indian tribes to engage in that same activity. . . . In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.²⁴⁵

Fundamental to this rationale is the premise that IGRA superseded the *Cabazon* criminal/prohibitory-civil/regulatory analysis such that it no longer applies.²⁴⁶ In *Panzer*, the court concluded that the 1993 Constitutional Amendment rendered all forms of gambling illegal if they were not explicitly permitted by law.²⁴⁷ Therefore, in the majority's view, the Governor could compact over expressly permitted games only and no more.²⁴⁸ No one denies, however, that the lottery, bingo, raffles, and pari-mutuel on-track betting are permitted in Wisconsin.²⁴⁹

The majority went on to state that "[u]ntil very recently, the *Lac du Flambeau* was the only case concluding that, once a state regulates one form of Class III gaming, the state must negotiate over all forms of Class III gaming."²⁵⁰ The court then, in an off-handed manner, dismissed the recent Seventh Circuit Court of Appeals case (the federal circuit in which Wisconsin is located), *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States* (*Lac Courte Oreilles*),²⁵¹ which follows the decision in *Lac du Flambeau*.²⁵²

the court shall call a 'ceiling' perspective, holding that [IGRA] requires compact games to be lawful under state law.").

245. *Rumsey Indian Rancheria*, 64 F.3d at 1258 (quoting 25 U.S.C. § 2710(d)(1)(B) (2000)) (internal citations omitted).

246. See *Panzer*, 680 N.W.2d 666 at 695 n.36. In a footnote, the majority asserted:

As we see it, *Cabazon* interpreted the effect of [Public Law 280] on Indian gaming: IGRA superseded both [Public Law 280] and *Cabazon* when it prescribed in detail the states' role in Indian gaming. Putting to one side the constitutional protections against the impairment of contracts, we do not understand IGRA to grant Indian tribes in Wisconsin the right to engage in gambling activities that are prohibited by the Wisconsin constitution and Wisconsin criminal statutes to all persons, organizations, and entities in the state.

Id.

247. *Id.* at 696.

248. See *id.* at 696–97.

249. See *supra* note 72 and accompanying text.

250. *Panzer*, 680 N.W.2d at 695.

251. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650 (7th Cir. 2004).

252. See *Panzer*, 680 N.W.2d at 695 n.36 (indicating that the Seventh Circuit's application of the *Lac du Flambeau* case was merely dicta).

In *Lac Courte Oreilles*, numerous Wisconsin tribes brought suit challenging the constitutionality of a provision of IGRA requiring gubernatorial concurrence for gaming on newly acquired tribal lands.²⁵³ In upholding the constitutionality of the statute, the court conducted a rather extensive discussion of IGRA, its relationship to *Cabazon*, and Wisconsin gambling policy.²⁵⁴ Specifically, the court noted that pursuant to the 1993 Constitutional Amendment, "casino gambling is not permitted under Wisconsin law."²⁵⁵ Nevertheless, the court went on to state that "[t]he establishment of a state lottery signals Wisconsin's broader public policy of tolerating gaming on Indian lands."²⁵⁶ In doing so, the court read *Cabazon* in conjunction with IGRA to conclude that "the lottery's continued existence demonstrates Wisconsin's amenability to Indian gaming."²⁵⁷ Furthermore, in a direct application of the rationale employed in *Cabazon*, the court took notice of the fact that "Wisconsin has not been willing to sacrifice its lucrative lottery and to *criminalize all gambling* in order to obtain authority under *Cabazon* and § 2710(d)(1)(b) to prohibit gambling on Indian lands" ²⁵⁸ Given this language, it appears that the Seventh Circuit considers the *Cabazon* rationale to be directly incorporated into IGRA.²⁵⁹

Furthermore, the Second Circuit has expressly adopted the rationale employed in *Lac du Flambeau*.²⁶⁰ In the seminal case in that circuit, *Mashantucket Pequot Tribe v. Connecticut*,²⁶¹ the Second Circuit directly incorporated the *Cabazon* analysis into its statutory interpretation of IGRA.²⁶² Specifically, the court stated: "[W]e accordingly conclude that the district court was correct in applying the *Cabazon* criminal/prohibitory-civil/regulatory test to [C]lass III gaming."²⁶³ Upon applying the *Cabazon* test, the court next concluded "that Connecticut 'permits games of chance, albeit in a highly regu-

253. *Lac Courte Oreilles*, 367 F.3d at 654.

254. *Id.* at 664–65.

255. *Id.* at 664.

256. *Id.*

257. *Id.*

258. *Id.* (emphasis added).

259. The *Panzer* majority was correct when it stated that this language was merely dicta; given, however, the appellate court's extensive analysis, it is very persuasive authority as to the proper law in the Seventh Circuit.

260. See *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1311 (10th Cir. 2004) (noting that the Second Circuit has adopted the "categorical approach" or "Wisconsin" analysis as set forth in *Lac du Flambeau*).

261. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

262. *Id.* at 1031.

263. *Id.*

lated form. Thus, such gaming is not totally repugnant to the State's public policy.'"²⁶⁴ Accordingly, it does not appear that the *Panzer* majority's IGRA analysis is accepted in all jurisdictions.²⁶⁵

Although the Supreme Court has not construed IGRA, it appears that the Seventh and Second Circuits are correct that IGRA incorporates the *Cabazon* rationale.²⁶⁶ For example, in enacting IGRA, Congress found that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."²⁶⁷ This language directly coincides with the Supreme Court's language in *Cabazon*,²⁶⁸ in which the Court stated:

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within [Public Law] 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [Public Law] 280 does not authorize its enforcement on an Indian reservation.²⁶⁹

The *Cabazon* test later resurfaces in IGRA under the section relating to the scope of permissible gaming. That section states: "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . (B) located in a State that permits such gaming for any purpose by any person, organization, or entity"²⁷⁰ It is important to keep in mind that Class III gaming is defined as "all forms of gambling that are not [C]lass I gaming or [C]lass II gaming."²⁷¹ Engrafting the definition of Class III gaming into the pertinent statutory section reads: "[All forms of gambling that are not Class I gaming or Class II gaming] shall be lawful on Indian lands only if such activities are . . . (B) located in a State that permits such gaming for any purpose by any person, organization, or entity"²⁷² This appears to be another

264. *Id.*

265. See *Northern Arapaho Tribe*, 389 F.3d at 1310–11 (observing that the interpretation of § 2710(d)(1)(B) "has spawned at least two different approaches regarding the scope of negotiations required between tribes and states under IGRA"); see also Steve J. Coleman, Note, *Lottery Logistics: The Potential Impact of a State Lottery on Indian Gaming in Oklahoma*, 27 AM. INDIAN L. REV. 515 (2003) (discussing the varying approaches taken by the circuits that have addressed the issue).

266. See *supra* notes 253–264 and accompanying text.

267. 25 U.S.C. § 2701(5) (2000).

268. See Amy Head, Comment, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH. L. REV. 377, 391–95 (2003) (arguing that this language evinces the fact that "Congress intended the *Cabazon* rationale to apply to IGRA").

269. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

270. 25 U.S.C. § 2710(d)(1).

271. *Id.* § 2703(8).

272. See *id.* § 2710(d)(1).

explicit importation of the *Cabazon* substantive test, in that if the state permits Class III gaming for any purpose, then "all forms of gambling that are not [C]lass I gambling or [C]lass II gambling" shall be lawful on Indian lands.²⁷³

Moreover, if the majority is correct that the state is required to negotiate only over games that the state expressly permits, then, in the words of the Second Circuit, "[t]he compact process that Congress established as the centerpiece of the IGRA's regulation of [C]lass III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible."²⁷⁴ Judge Canby, in his dissent to a denial of a rehearing *en banc* in *Rumsey*, echoed the Second Circuit's fears.²⁷⁵ According to Judge Canby, the *Rumsey* decision as it stands "frustrate[s] the scheme of state-tribal negotiations that Congress established in IGRA," and that the "ruling effectively frustrates IGRA's entire plan governing Class III Indian gaming."²⁷⁶ From a common-sense standpoint, the Second Circuit and Judge Canby are correct by recognizing that if the state is required to negotiate only over games that are legal within the state, then the compact would be meaningless because tribes, like any other person or group, can conduct any legal gaming without the protection of a compact under IGRA.

In summary, because IGRA incorporates the *Cabazon* test, the proper analysis is whether the state regulates gambling or prohibits it all together; it is not whether specific forms of gaming violate certain provisions of state law.²⁷⁷ In Wisconsin, it is clear that the state merely regulates gambling.²⁷⁸ In fact, the state constitution explicitly permits pari-mutuel on-track betting and lotteries.²⁷⁹ Although the majority hangs its hat on the "prohibitory" language of the state constitution, the fact remains that various forms of gambling are permitted in Wisconsin. In *Cabazon*, the Supreme Court stated that this was enough to render gambling laws unenforceable on Indian lands.²⁸⁰

273. See Head, *supra* note 268, at 391-95.

274. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1031 (2d Cir. 1990); see also Coleman, *supra* note 265, at 533-35 (discussing Judge Canby's dissent from the majority's denial of an *en banc* rehearing in *Rumsey Indian Rancheria*).

275. *Rumsey Indian Rancheria of Winturn Indians v. Wilson*, 64 F.3d 1250, 1253 (9th Cir. 1994) (Canby, J., dissenting) (stating that "[t]he Second Circuit's fears of turning IGRA's compact process into a dead letter are well-founded").

276. *Id.*

277. Sullivan, *supra* note 23, at 1126.

278. See Panzer v. Doyle, 680 N.W.2d 666, 721 (Wis. 2004); see also Lac Courte Oreilles Band of Lake Chippewa Indians v. United States, 367 F.3d 650, 664 (7th Cir. 2004).

279. See *supra* notes 70-72 and accompanying text.

280. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209-10 (1987).

Furthermore, applying the *Cabazon* rationale to IGRA comports with common sense because otherwise the compact is rendered a “dead letter.”²⁸¹ Therefore, the majority was wrong when it construed IGRA as permitting the governor to negotiate only over games that are expressly legal in Wisconsin.²⁸²

V. IMPACT

From a legal perspective, *Panzer* has many ramifications—most of which are not promising for Wisconsin’s tribes. First and foremost, the *Panzer* decision will undoubtedly play an important role in the court’s *Dairyland* decision, and the impact of *Panzer* will be contingent upon how the court decides *Dairyland*.²⁸³ Nevertheless, assuming that the Wisconsin Supreme Court will be unwilling to abolish Indian gaming in Wisconsin, the *Panzer* decision will continue to affect the compacting process.²⁸⁴

A. *The Panzer Fallout and the New Compact Amendments*

Before discussing what effect *Panzer* will have in the long run, one must know the immediate reaction to the decision. Specifically, on October 4, 2005, shortly after being dealt the blow of *Panzer*, Doyle and the Potawatomi agreed to new compact amendments (Post-*Panzer* Amendments).²⁸⁵ Despite the *Panzer* decision, the Post-*Panzer* Amendments called for a twenty-five year duration provision that automatically renewed unless one party served notice of nonrenewal.²⁸⁶ Additionally, in order for the state to serve notice of nonrenewal, the legislature must first pass a statute directing the governor to serve the notice; the governor could ostensibly veto such a bill.²⁸⁷ Furthermore, the Post-*Panzer* Amendments implicitly permit the continuation of the same Class III gaming that the Wisconsin Supreme Court deemed ille-

281. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990).

282. See *supra* notes 147–161 and accompanying text.

283. See *infra* notes 290–312 and accompanying text.

284. See *infra* notes 313–327 and accompanying text.

285. See 2005 Amendment to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended, Oct. 4, 2005 [hereinafter Post-*Panzer* Amendments], available at http://www.doa.state.wi.us/docs_view2.asp?docid=5275.

286. See *id.* ¶ 7(A)–(B) (amending section XXV of the Original Compact) (stating that “[t]he Compact shall be extended for a term of 25 years from the date notification of this 2005 Amendment” and “shall be extended automatically . . . unless either party serves a notice of nonrenewal”).

287. See *id.* ¶ 7(B)(1)(a) (stating that “[t]he Governor shall serve a notice of nonrenewal . . . only if the State first enacts a statute directing the Governor to serve a notice of nonrenewal”); see also James J. Wawrzyn, Note, *Panzer v. Doyle: Wisconsin Constitutional Law Deals the Governor a New Hand*, 89 MARQ. L. REV. 222, 236 (2005).

gal in *Panzer*.²⁸⁸ At the same time, the Potawatomi agreed to pay \$43.625 million to the state in 2005, and between 6.5% and 8% of their Milwaukee casino's net win for each year thereafter until the compact expires in 2035.²⁸⁹

B. The Majority Decision Places the Future of Indian Gaming in Wisconsin in Jeopardy

While the *Panzer* decision was a severe blow to the Wisconsin tribes, greater trouble looms for the tribes on the legal horizon—those involved in the *Dairyland* litigation.²⁹⁰ Unlike *Panzer*, which did not raise the fundamental issue of whether Indian tribes can conduct gaming operations at all in the State of Wisconsin, *Dairyland* raises that exact issue, and the Wisconsin Supreme Court will decide the fate of Indian gaming once and for all.²⁹¹ With that case on the horizon, it is clear that the *Panzer* decision is a prelude to the fate of Indian gaming.

On January 13, 2005, the Wisconsin Supreme Court accepted a state court of appeals invitation to hear *Dairyland* once again.²⁹² That case is of fundamental importance to the Wisconsin tribes collectively because, unlike the plaintiffs in *Panzer*, the plaintiff in *Dairyland*, Dairyland Greyhound, seeks an injunction prohibiting the governor from extending the existing compacts beyond their original five-year renewal term or entering into any new compacts in light of the 1993 Constitutional Amendment.²⁹³ It is worthwhile to make clear that *Dairyland* does not challenge the validity of the Original Compacts. Rather, it contends that the “1993 [Constitutional] Amendment affected the Governor’s power under state law prospectively so that in 1998 and thereafter he had no authority to amend, renew or in any

288. See Post-*Panzer* Amendments, *supra* note 285, ¶ 7(D) (stating that “[t]he Tribe may operate Class III gaming while this Compact, or an extension thereof under this sections [sic], is in effect”); see also Steve Schultze & Patrick Marley, *Casino Deal Restarts Payments 25-Year Pact With Potawatomi to Bring \$43.6 Million This Year*, MILWAUKEE J. SENTINEL, Oct. 5, 2005, at A1 (explaining that “[t]hrough the new pact doesn’t say so explicitly, it also preserves the expanded array of casino games that were authorized under the terms of the tribe’s 2003 compact and thrown out last year by the state Supreme Court”).

289. See Post-*Panzer* Amendments, *supra* note 285, ¶ 9 (amending section XXXI.G.2 of the Original Compact).

290. See *supra* notes 93–106 and accompanying text.

291. See *supra* notes 93–106 and accompanying text.

292. See *High Court Agrees to Hear Gaming Suit Again*, WIS. SR. J., Jan. 13, 2005, at B3 (explaining that the Wisconsin Supreme Court agreed to hear *Dairyland* again after previously remanding the case to the Court of Appeals).

293. See *Dairyland Greyhound Park v. McCallum*, 655 N.W.2d 474, 476–77 (Wis. Ct. App. 2002).

way extend the duration of the compacts for casino gambling.”²⁹⁴ Although the *Panzer* court expressly left that question open, the majority’s decision and rationale will undoubtedly play an important role in the *Dairyland* decision.²⁹⁵

In *Panzer*, the majority found that Governor Doyle exceeded his authority when he agreed to a compact provision that included additional Class III games.²⁹⁶ In doing so, the majority noted that their “holding . . . raises inevitable questions about the validity of the [O]riginal Compact[s] and the 1998 amendments thereto.”²⁹⁷ This is because, in the majority’s words, “[c]learly, the 1992 Compact encompasses games that were and are precluded under our state’s criminal statutes.”²⁹⁸ Further analysis of the majority decision reveals that it contains mixed signals as to the continued validity of Indian gaming.

In concluding that Doyle unlawfully compacted with the Potawatomi to permit additional Class III gaming, the *Panzer* majority found the 1993 Constitutional Amendment to be conclusive with respect to the fact that such additional games were illegal.²⁹⁹ According to the majority, IGRA does not “grant Indian tribes in Wisconsin the right to engage in gambling activities that are prohibited by the Wisconsin constitution and Wisconsin criminal statutes to all persons, organizations, and entities in the state.”³⁰⁰ For the purposes of *Dairyland*, the majority’s analysis in *Panzer* means that after 1993, all forms of gambling not expressly permitted by Wisconsin law, as embodied in the state constitution and criminal statutes, are illegal.³⁰¹ This leaves open the question of whether the compacts as amended are still valid, and the court expressly declined to tread into that territory.³⁰²

294. Brief of Plaintiff-Appellant at 11, *Dairyland Greyhound Park, Inc. v. Doyle*, No. 03-0421, 2004 WL 2522611 (Wis. Ct. App. Nov. 2004).

295. See *Panzer v. Doyle*, 680 N.W.2d 666, 697 (Wis. 2004).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 693.

300. *Id.* at 695 n.36.

301. See *Panzer*, 680 N.W.2d at 696-98.

302. See *id.* at 697. The majority stated:

[W]e do not believe the 1992 compact suffered from any infirmity under state law when it was entered into. Whether the 1992 compact is durable enough to withstand a change in state law that alters our understanding of what is ‘permitted’ in Wisconsin is a separate question. The resolution of this question is likely to turn, at least in part, on the application of the impairment of contracts clauses in the United States and Wisconsin Constitutions as well as IGRA.

Id.

The court further noted that the plaintiffs in *Panzer* conceded the validity of the 1992 Original Compacts and the 1998 amendments thereto, and the majority has “not as yet been presented with a persuasive case to conclude otherwise.” *Id.* at 697 n.38.

Nevertheless, the *Panzer* court's conclusion that the 1993 Constitutional Amendment squarely precludes any form of gambling not expressly authorized, coupled with the fact that the *Panzer* majority held that Doyle could not expand the scope of Class III gaming because such games were illegal, suggests that the *Dairyland* court might "complete the task begun by *Panzer*" by ruling that the Governor is without authority to extend the compacts because such gaming is illegal under Wisconsin law.³⁰³ In order to reach such a conclusion, the court will inevitably have to also conclude that the 1993 Constitutional Amendment did not violate the impairment of contracts clauses of the United States Constitution and Wisconsin state constitution.³⁰⁴

This is the exact result desired by Dairyland Greyhound.³⁰⁵ Their argument, although complex, can be reduced to the following points: (1) All gambling not otherwise expressly permitted in Wisconsin is illegal; (2) the governor is without authority to compact for games that are illegal in the State; and (3) the 1993 Constitutional Amendment does not violate the impairment of contracts clauses in the federal and state constitutions.³⁰⁶ As one can see, the *Panzer* decision works to Dairyland Greyhound's advantage for the first two points. Specifically, *Panzer* upheld the notion that the 1993 Constitutional Amendment (now embodied in article IV, section 24 of the Wisconsin Constitution) prohibits all forms of gambling not expressly authorized by Wisconsin law.³⁰⁷ For purposes of emphasis, the 1993 Constitutional Amendment permits only bingo games conducted by charitable organizations, raffles, a state lottery, and pari-mutuel on-track betting.³⁰⁸ Furthermore, the *Panzer* majority's conclusion that "[n]othing in section 24 [of the Wisconsin Constitution] authorizes electronic keno, roulette, craps, and poker" supports the conclusion that the Wisconsin constitution also prohibits blackjack and slot machines because those games are expressly prohibited.³⁰⁹

303. Brief of Plaintiff-Appellant, *supra* note 294, at 12.

304. See *Panzer*, 680 N.W.2d at 697 ("Any attempt at this point to impair [the Original Compacts] would create serious constitutional questions.").

305. See generally Brief of Plaintiff-Appellant, *supra* note 294, at 12-32.

306. *Id.*

307. See *Panzer*, 680 N.W.2d at 693 ("The text of the [state] constitution is absolutely clear: 'Except as provided in this section, the legislature may not authorize gambling in any form.'").

308. WIS. CONST. art. IV, § 24(1)-(6).

309. WIS. CONST. art. IV, § 24(6)(c) states in relevant part:

(c) Notwithstanding the authorization of a state lottery under par. (a), the following games, or games simulating any of the following games, may not be conducted by the state as a lottery: 1) any game in which winners are selected based on the results of a race or sporting event; 2) any banking card game, including *blackjack*, *baccarat* or *chemin de fer*; 3) *poker*; 4) *roulette*; 5) *craps* or any other game that involves rolling dice; 6) *keno*; 7) *bingo 21*, *bingo jack*, *bingolet* or *bingo craps*; 8) *any game of chance*

The *Panzer* court also noted that this section of the Wisconsin constitution “acts as a limitation on both the legislature and the governor, so that if one is prohibited by the provision, so is the other.”³¹⁰ With that premise, the *Panzer* majority concluded that because the state lottery cannot conduct such games, the state’s public policy is to prohibit them outright, and the “legislature may not authorize [new casino-type] gambling in any form.”³¹¹ As one case see, the *Panzer* decision provides support for the proposition that the governor is without authority to extend or renew the compacts because all Class III gaming is *expressly* illegal in the State.

Accordingly, the *Dairyland* case will likely turn on issues of constitutional law—namely whether the 1993 Constitutional Amendment violates the impairment of contracts clauses of the federal and state constitutions.³¹² If the court concludes that the 1993 Constitutional Amendment does in fact violate the federal and state contracts clauses with respect to the Original Compacts, then given *Panzer*’s holding that IGRA permits the State to negotiate only over games that are expressly legal, Indian gaming in Wisconsin will be relegated to its original 1992 form—permitting only those games that were allowed pursuant to the Original Compacts. On the other hand, if the court concludes that the 1993 Constitutional Amendment works no impairment on the compacts, then the Potawatomi, and the rest of the state’s tribes can cash in their chips because Indian gaming will be a phenomena of the past in Wisconsin.

C. *The Panzer Fallout Exemplifies How the Court Created Further Confusion With Respect to the Compacting Process by Not Providing Guidelines for Future Compacts*

Despite the potential dire consequences that *Panzer* may have with respect to *Dairyland*, it is unlikely that the Wisconsin Supreme Court

that is played on a slot machine or any mechanical, electromechanical or electronic device that is generally available to be played at a gambling casino

Id. (emphasis added).

310. *Panzer*, 680 N.W.2d at 693.

311. *Id.* at 696.

312. While the *Panzer* majority expressly declined to wade into these constitutional issues, the dissent made the “impairment of contracts” analysis central to its opinion. *See id.* at 718–28 (Abrahamson, C.J., joined by Bradley, J., and Crooks, J., dissenting). In doing so, the dissent concluded that the majority decision violated the impairment of contract clauses. *Id.* at 728. Prophetically, the dissent noted that “[g]iven the majority’s analysis . . . what reasons could the majority logically and legitimately use to retain the 1992 compact and 1998 amendments, yet discard the 2003 amendments?” *Id.* at 727.

will sound the death knell for Indian gaming in Wisconsin.³¹³ Accordingly, *Panzer* will continue to provide the framework for future compacting in the State of Wisconsin, and the *Panzer* fallout exemplifies how the court's decision in that case did nothing more than create further confusion with respect to the compacting process. Specifically, the majority's decision provides no guidance for how long compacts can endure—thus leaving the door open to future lawsuits regarding duration provisions.³¹⁴ This problem is compounded by the fact that the court's implicit procedural safeguards are not safeguards at all.³¹⁵

As the *Panzer* fallout shows, the majority's opinion fails to provide guidelines for future compact negotiations, especially with respect to the duration provision. This means that Governor Doyle and future governors are relegated to compacting with the tribes in legal limbo. As outlined above, the majority determined that the governor was without authority to agree to a compact duration provision that circumvented the implicit procedural safeguards that sustained Section 14.035's constitutionality.³¹⁶ Again, those safeguards were that: (1) the legislature retains the power to repeal Section 14.035 if it can override a gubernatorial veto; (2) the legislature may amend Section 14.035 (as they tried to and failed in this case); and (3) the "legislature may appeal to public opinion" to influence the governor's actions.³¹⁷ By agreeing to a compact provision that endures indefinitely, the majority claimed that the governor "circumvent[ed] the procedural safeguards that insure that delegated power may be curtailed or reclaimed by future legislative action."³¹⁸

Yet, the majority failed to provide any guidance within its discussion as to how the governor can in the future agree to a duration provision that does not circumvent these implicit procedural safeguards.³¹⁹ Instead, future governors are left to guess the length of a duration provision that will not "terminate [the legislature's] ability to make law in [the] important subject area [of Indian gaming]."³²⁰ Taking the Post-*Panzer* Amendments as an example, a twenty-five-

313. Given the revenue stream that Indian gaming generates for the state and local government, abolishing Indian gaming all together would create enormous budget shortfalls. Furthermore, it could mobilize the tribes to exercise their political power against the justices, who are elected officials. See Ed Garvey, Editorial, *Tribe's Millions for Elections a Nail in Democracy's Coffin*, CAP. TIMES, Nov. 8, 2005 at 7A (discussing the political prowess of the tribes).

314. See *infra* note 319–323 and accompanying text.

315. See *infra* notes 324–327 and accompanying text.

316. *Panzer*, 680 N.W.2d at 692.

317. *Id.* at 689.

318. *Id.* at 690.

319. See generally *id.* at 689–92.

320. *Id.* at 692.

year duration provision³²¹ would still severely curtail the legislature's ability to make law in the area of Indian gaming, yet the court's decision does not provide any guidance as to whether such a provision would also be unlawful.³²² In fact, in *Dairyland*, the plaintiffs have amended their petition to the Wisconsin Supreme Court to make that exact argument.³²³ Although Doyle seems to have slighted the court by entering into the Post-*Panzer* Amendments (especially with respect to the continuation of Class III gaming), those amendments nevertheless evince the fact that the court provided no guidance at all for future compact negotiations with respect to acceptable duration provisions.

This problem is compounded by the fact that the procedural safeguards that the majority cited to uphold the statute provide no guidance for governors exercising their authority under Section 14.035.³²⁴ Again, take the twenty-five year duration provision contained within the Post-*Panzer* Amendments as an example.³²⁵ A compact that endured for twenty-five years would, for all intents and purposes, not be affected if the legislature repealed or amended Section 14.035. Similarly, the public would not be able to influence the governor's actions in relation to the compact provision in question.³²⁶ That is because, as one commentator aptly pointed out, "[b]etween now and 2035, when the [Post-*Panzer* Amendments would expire], Wisconsin will have eight gubernatorial elections and sixteen legislative elections."³²⁷ In other words, the governor is left to compact blindly over gaming and duration provisions because the court gave no guidance as to what term of years would satisfy the implicit procedural safeguards.

321. See *supra* notes 285–286 and accompanying text.

322. See *Panzer*, 680 N.W.2d at 689–92 (holding that the duration provision was the result of an invalid exercise of power but failing to discuss whether duration provisions of varying lengths would similarly be invalid); see also Wawryzn, *supra* note 287, at 235–37 (explaining how the twenty-five year duration provision of the Post-*Panzer* Amendments will also likely violate the "implicit" safeguards relied upon by the *Panzer* majority).

323. See Patrick Marley, *Dog Track Challenges New Casino Pact; Potawatomi Deal Still Unconstitutional, Dairyland Says*, MILWAUKEE J. SENTINEL, Oct. 12, 2005, at B1 (reporting that Dairyland Greyhound filed a motion with the Wisconsin Supreme Court in the pending *Dairyland* case to rule the Post-*Panzer* Amendments unconstitutional in light of *Panzer*).

324. See *infra* notes 325–327 and accompanying text.

325. See *supra* notes 285–286 and accompanying text.

326. While it is true that in one hundred years the legislature could act on Indian gaming, it is not true that the public could influence the current governor's actions.

327. Wawryzn, *supra* note 287, at 236.

VI. CONCLUSION

For the Potawatomi and the rest of Wisconsin's Native American tribes, the majority decision in *Panzer* represents a sign that the new buffalo may become an endangered species and might possibly face extinction—at least in Wisconsin. Specifically, the majority decision threatens the new buffalo in Wisconsin by holding that the governor was without authority to agree to a compact provision that expanded the permissible scope of Class III gaming.³²⁸ In doing so, the majority misinterpreted the statutory text of IGRA by reading the *Cabazon* analysis out of the statute.³²⁹ The potential ramifications are severe. Beyond the fact that the tribes can ostensibly not conduct such expanded gaming operations, state revenues, which rely heavily upon tribal payments pursuant to the compacts, will likely decrease.³³⁰

The majority opinion further threatens the new buffalo in Wisconsin because it held that the governor was without authority to agree to gaming compact provisions that caused the compacts to, for all intents and purposes, endure indefinitely.³³¹ According to the majority, the duration provision was invalid because it circumvents the implicit procedural safeguards that sustain the constitutionality of the law which grants the governor the authority to enter into gaming compacts in the first place.³³² In so holding, the majority failed to provide any guidelines as to what type of duration provision will not circumvent these safeguards.³³³

But a greater danger to the tribes looms in the distance—and it is growing closer and closer as each day passes.³³⁴ That danger is personified in *Panzer's* sister case, *Dairyland*.³³⁵ While the *Panzer* court stopped short of addressing the fundamental issue of whether Indian gaming is valid in Wisconsin pursuant to the 1993 Constitutional Amendment, the *Dairyland* court will have to address that very question.³³⁶ In deciding that case, *Panzer* will likely play a pivotal role because the court's reasoning and rationale act to limit gaming in Wisconsin.³³⁷ If the *Dairyland* court does "complete the task begun by

328. See generally *supra* notes 147–161 and accompanying text.

329. See generally *supra* notes 232–282 and accompanying text.

330. See generally *supra* notes 290–312 and accompanying text.

331. See generally *supra* notes 135–146 and accompanying text.

332. See generally *supra* notes 118–161 and accompanying text.

333. See generally *supra* notes 285–289 and accompanying text.

334. At the time this Note was submitted for publication, the court had yet to decide *Dairyland*.

335. See generally *supra* notes 93–106 and accompanying text.

336. See generally *supra* notes 290–312 and accompanying text.

337. See generally *supra* notes 290–312 and accompanying text.

Panzer,” then the new buffalo will no longer roam the range in Wisconsin.³³⁸

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338. See generally *supra* notes 313–327 and accompanying text.

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